No. 3710

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ANGELO H. ROSSI,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon.

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STATEMENT OF THE CASE

The indictment in this case is in one count. It charges a conspiracy, under Section 37 of the Penal Code, to violate certain counterfeiting statutes of the United States, to-wit: Sections 148, 151 and 154 of the Penal Code. There is further charged in the same count a conspiracy to defraud the United States. In brief, the conspiracy is said to have contemplated a scheme of

altering United States War Savings Certificates and United States War Savings Certificate Stamps by detaching the stamps from the certificates to which they had been affixed and by erasing the serial number from the face of the stamps, and of buying, possessing and selling the same with the various intents denounced by the counterfeiting statutes hereinbefore mentioned. The defendant Rossi, (Plaintiff in Error here) one of the alleged conspirators, challenged the sufficiency of the indictment by demurrer, claiming that it failed to state suffiicent facts, and further that it was duplicitious (trans. p. 29). The demurrer was duly argued and taken under advisement. Prior to the court's decision thereon, which was adverse to the defendant, and before any plea had been interposed to the indictment, the case was set down for trial and was in fact tried without any issue having been joined by this defendant. (Trans. p. 17.) The trial resulted in the acquital of one defendant, disagreement as to three others, and conviction of the defendants Rossi and Peterson. From the judgment entered thereon, each of the last named defendants prosecuted a writ of error to this court. Under date of August 1, 1921, this court having heard Peterson's writ, rendered an opinion in his favor, holding that the Government had failed to establish the charge of conspiracy.

The points involved in the case at issue, which will be discussed in the order named, are as follows:

1. Insufficiency of indictment.

2. Record fails to show any issue joined by defendant.

3. Prejudicial remarks of trial judge.

4. Prejudicial newspaper accounts rendering fair trial impossible.

5. Improper evidence as to registration of stamps.

6. Improper evidence as to defendant's admissions before grand jury.

7. Prejudicial testimony of defendant's admissions to Bryon.

8. Error in instructions.

9. Re new trial granted to Peterson.

SPECIFICATIONS OF ERROR.

I.

That the trial court erred in overruling the demurrer to the indictment in this, to-wit:

(a) That the said indictment is duplicitious in that two offenses are charged or attempted to be charged therein.

(b) That the said indictment does not state facts sufficient to constitute an offense or a crime against the laws of the United States.

II.

The trial court erred over the objection and exception of the defendant in admitting the following evidence testified to by Miss Daisy Buckner, a witness for the government:

Q. Miss Buckner, state whether or not any claims for the loss of registered stamps on the night of March 3, 1920, were filed at the postoffice at Scio, Oregon.

A. There have been.

Q. Will you just explain briefly to the jury, Miss Buckner, what these registered stamps are, and how they are registered, so that they may understand it.

A. The regulations governing the registration of war savings stamps are that stamps may be registered at any first, second or third-class postoffice, regardless of when or where they were purchased or by whom they were purchased, except that of course stamps being registered must at the time of the registration have entered upon the certificate upon which they have been pasted and are—none are registered except what are pasted upon certificates—and those stamps are each cancelled separately by means of a rubber stamp, impression stamp, bearing the postoffice number and the serial number, each number on each stamp, the serial number being the same, and beginning with 1 and numbering consecutively as long as the registration is carried out.

Q. Well, state whether or not any one in the vi-

cinity of Scio made a claim at the Scio postoffice after March 3, 1920, for the replacement of stamps that were lost.

A. There have been perhaps—I don't know the exact number—between twenty and thirty, more or less.

Q. Twenty or thirty people?

A. Yes.

Q. Have you a list of those?

A. I have.

Q. Just read the names of the parties who have made claims for stamps.

A. Edward D. Jones, Minnie D. Jones, Albert E. Randall, Mrs. Rosella White, William A. White, Mrs. Elizabeth J. Ewing, George M. Bilyeu, Clarence Roy Scott, Marjorie Moses, Grace Bilyeu, Anton Holub, Daisy Buckner, Vaclav Prokop, Waunita Stepanek, Viola Stepanek, Mrs. Ollie MacDonald, Fred Jones, Robert C. Daniel, Frankie Holub, Mrs. Melvina Randall, W. R. Kelly, W. J. Kelly, Effie Rodgers, James Keith White, Ephraim Piatt, Ruth Eichinger, Mary Holub, Melda Bilyeu, Guy Funk, J. T. Funk, Mrs. O. S. Funk, Mrs. Nancy D. Arnold, Wilbur Funk, F. J. Denny, Chas. A. White, William Phillips, Elva Phillips, C. F. Sargent, Joe Holub, Frank Schindler, J. A. or Minnie D. Craft, Mrs. Lulu Quinn, C. H. Rockwell, Eleanor Shimanek, Mrs. Emma Holub, Mrs. Mary E. Richardson, Verlin Richardson, Thomas A. Richardson,

Thomas P. Prospal, Mrs. Cora Eichinger, Antoine Prokop, John W. Scott, Glen A. Scott, C. A. Silbernagel, Rosa Silvernagel, John Soucek, Fred Mespelt, Frances Higinbotham, Eldon Vaughan, Mrs. Emma Cain and Napoleon B. Moses.

III.

That the trial court erred over the objection and exception of the defendant in admitting the following evidence testified to by W. R. Bryon, a witness for the government:

Q. I will ask you whether or not on or about the 10th day of May, 1920, you had an interview with Angelo H. Rossi?

A. I did.

Q. Was he being interviewed with a view of ascertaining information about war savings stamps?

A. He was.

Q. Was he under arrest at the time?

A. He was not.

Q. State, Mr. Bryon, as near as you can recollect, what was said by Mr. Rossi at the time.

A. I called him in there and asked him about this Earl Lee, what business he had with Earl Lee, and what he knew about him.

Q. What was said at that time?

A. By Rossi?

Q. Yes.

A. Rossi told me that he knew something about this, and that if I had any idea that he was going to give any testimony about it I might as well forget it, and throwed his fist down on the desk and made everything jump in the air. And if you want to know what I said I will repeat it.

MR. GOLDSTEIN: Go ahead. Tell what you said.

A. I told him that he was not conducting any investigation or running any part of the government's business, and that if he wanted to make any such statement as that to go downstairs and tell it to the court on the second floor; that he had a way of dealing with him; that he nor anybody around there would direct who would testify or who would not testify, or when they would testify, and that he would not be consulted concerning the operation or the direction of any government investigation, nor be asked any suggestion. All he had to do was to answer a few simple questions.

IV.

The trial court erred over the objection and exception of the defendant in permitting the said W. R. Bryon to give such testimony orally on the ground that the same had theretofore been reduced to writing, and that the written transcript thereof was the best evidence.

V.

The trial court erred over the objection and exception of the defendant in permitting to be read in evidence before the jury the following statement of the defendant, made to W. R. Bryon and as transcribed by Miss Harriet Doeltz, a witness for the government.

MR. VEATCH: You understand this, Rossi, that you are not required to tell me anything, but whatever you do say here can be used against you. You are in no position to tell us what you will do or what you will not do. There has been certain government property that has been stolen. It is our business to find out the men who are guilty, and it is our business to find out who all is mixed up with it. You have been called in here and given an opportunity to explain what you know about it because we know you have had correspondence with certain of these men who, we know, stole certain government property—now if you are one of that bunch we want to know it.

A. I am not.

Q. If you are not one of the bunch, now is the time to clear it up, but remember this, that when it comes to the time of trial it is necessary for us to use you, you certainly will be called as a witness. Now, we are not promising you anything. You are in no position to demand anything.

A. Well, as far as that correspondence is con-

cerned, there is nothing in that correspondence that can get me in wrong with the government. I know that.

Q. Well, what about going down to the U. S. Bank and getting these blank certificates for war savings stamps?

A. Yes, I did go down.

Q. And put war savings stamps on them?

A. Yes.

Q. Where did you get those stamps?

A. Got them from a fellow named Whitey.

Q. Swede Whitey?

A. Yes.

Q. The fellow now under arrest?

A. Yes.

Q. When did you get them from Whitey?

A. Well, I couldn't tell you the date exactly—it was a few days previous to the time I went down—

Q. How long have you known Whitey?

A. Two years.

Q. Well, you know Whitey is a yegg?

A. I got acquainted with him when he got paroled out of Salem; when he was working in the shipyards.

Q. Didn't you know these stamps were stolen?

A. No, I never asked those fellows any questions. There were enough stamps for seven books and maybe twenty or twenty-five over.

Q. Well, you had reason to suspect these stamps were stolen?

A. Well, it's just like this—you have to consider the source. I know when I had that store—Swede Whitey bought stamps when he worked in the shipyards because it was compulsory; but that happened a couple of years ago.

Q. Did you pay him anything for those stamps?

A. No, sir. He wanted me to dispose of them.

Q. He wanted you to sell them?

A. Yes, sir.

Q. Do you run a pawnshop?

A. No, sir.

Q. How did he happen to be selling stuff to these people?

A. Well, I don't know. That particular time he came into the store and bought a ring off from me. He asked me if I could dispose of stamp for him. I told him I didn't know—every jeweler, in fact 90 per cent of the men on the street will buy them and take them in on sales, and like that.

Q. Well, did you try to sell any of them?

A. Yes.

Q. Where?

A. I asked two or three people.

Q. Whom did you ask?

A. Well, I asked a fellow by the name of Dave Stein, but he said he would buy them if they were on books and he got a bill of sale. Well, just about that

time the secret service men came into the store and I didn't have time to do anything with them.

Q. Did you try to sell to any one beside Stein?

A. Yes, I did. Two or three different pawnshops, but they wanted them for nothing, you know.

Q. What did you do with them then?

A. Well, I had them in the store and Joe Walters of the secret service came into the store and said: "Rossi, have you any war savings stamps?" I said I did. He said: "How many?" I said I have seven books of them. He said: "Where are they at?" And I handed them to him. He asked me if I had any more and I gave him the rest. He asked me where I got them and I told him, and he went up and got Swede Whitey and they arrested him, so I didn't have the stamps in my possession more than about, I should judge, a day and a half. It might have been two days.

Q. Rossi, do you know you are violating a law when you have this in your possession?

A. I didn't know it then but I know it now—Glover read the law to me. When they came into the store and I saw they were on the case, I didn't hesitate. I said: "If they are crooked I don't want them" and I gave them the stamps in two minutes. In fact I was making no secret about disposing of them. I asked several people: "Do you need war savings stamps—at a slight discount?" Whitey was asking $3.75 each for them.

Q. Has John Bull a solution that will remove the registry numbers?

A. When I got these stamps I notices a peculiar odor, but I couldn't see any number on them.

Q. What did you mean, Rossi, when you said here that you wouldn't take the stamps in this case?

A. Because they suspicioned that I was responsible for Swede Whitey and all the rest of them getting pinched and my 'phone rang so much—I have been compelled to carry a gun for the last three or four weeks because if I saw one of these fellows and they didn't look right to me I would see that I started shooting first. I know them people better than any one in Portland—I know what they are capable of doing.

Q. Have you gotten other stuff from these fellows?

A. No, absolutely not, never.

Q. Did you ever go as a fence for them?

A. No, sir. They never used to come near me because I never really had enough money. They do business with people who have plenty of money. The only thing, I knew Johnny Bull years ago; in fact, he is the only one I knew of that gang, although the local policemen think I acted as a fence for those boys. They never gave me 10c worth of stuff, never. I don't know whether your office is connected with Glover's office. Glover can tell you that it was through me that they got all they did get and I helped them; gave my time to it; neglected my business and everything else to help

Glover on that case, with the understanding, positively, that I would not get mixed up in court with it. I thought I did enough. I personally accomplished for them what has been accomplished.

Q. Were you the informant then that Walters refused to tell his name at the hearing up here?

A. Well, I don't know. I suppose so, unless he was referring to somebody else.

Q. At the time of the commissioner's hearing—

A. I don't want to be classified as an informant or anything else. It was simply when they came, I told them the truth, that's all.

Q. That's all you can do anywhere?

A. Yes, a man is foolish if he doesn't.

Q. At the time of the commissioner's hearing, Mr. Walters was asked if he had ever seen these stamps before, and he said he had, but refused to tell where he saw them, because he said it would be to his informant—that an officer is not required to tell where he got the information. You understand this man Lee was arrested in Idaho.

A. Yes.

Q. And certain correspondence passed between you and Lee?

A. Yes.

Q. You understand that we know Earl Lee, Johnny Bull and Swede Whitey robbed the Scio bank?

A. Well, that's what I heard. I never believed

Lee has anything to do with Johnny Bull. He said he did in letters he wrote, because at that time Earl Lee was in trouble with an automobile, and I was giving him money to live on, and I couldn't figure how he got in on that job—of course, he may have been "bulling" me.

Q. Earl Lee was in trouble with an automobile?

A. Well, he bought a machine and forgot to pay for it, that was all.

Q. What kind of a machine did he get?

A. Hudson Super-Six.

Q. Well, Rossi, I don't know anything about your connection with them except what you told me.

A. That is the only connection I had. In fact, I never saw any of the fellows previous to a year ago.

Q. Who is "Nellie?"

A. I heard she is pretty,—well smart woman. She seems to handle the bank roll.

Q. She lives with Tom Shay?

A. I always thought she lived with Gleason.

Q. Well, Tom goes by the name of Malone.

A. I'm not personally acquainted with him, only what I heard of him. He is kind of a safe cracker.

Q. You don't know whether Nellie is living with Gleason or Shay?

A. I always thought she lived with Gleason, from what I heard.

Q. What do you know about Nellie?

A. I don't know her personally. I wouldn't know her if I saw her. Just heard fellows talk about her. Johnny Bull seems to think a lot of her. My own personal opinion is that that woman used to do the locating for that gang.

Q. Well, Rossi, the government has started out to clean out this whole bunch.

A. Well, it's a good job. I'm surprised they didn't do it years ago.

Q. We are not asking you to be informant on anybody, but we have run onto your trail in investigating this case. All we ask of you is simply to tell the truth.

A. Well, I'm giving it to you. As I say, that gang kept away from me. Of course, I always knew in my own mind that they were responsible for these robberies that were going—they always seemed to have money. Of course, a man didn't have proof of what they were doing. I haven't seen Johnny Bull now for at least eight months. About a year and a half ago he used to come down pretty often, but something happened at that time and they got suspicious and kept away; and it, of course, pleased me.

Q. You are in this position: As I say, we have run onto your trail in investigating this case. There have been two sets of officers working on it. A part of the information we have in connection with this case came through the secret service, and a part of it has come through Mr. Bryon's office. Now, we are going to

clear this thing up from top to bottom, and every man who knows anything about it is going to tell what he knows about it. That is clear, is it? You are in no position to say here what you will or will not testify to. The only thing you can say is you will tell the truth. That is all we ask you to do.

A. I have told you the truth. I have told Glover the truth, and if the word of the secret service is not good—

Q. Well, I am not in the secret service. I am a prosecuting officer.

A. They have me to thank for what they have accomplished in this case.

Q. We know more about this case than what you have told us, that didn't come from the secret service.

Mr. Bryon:

"Salt Lake, 5:21 p. m. Evans State Bank, America Falls Draught Earl Evans State Bank Draught Earl Lee 50.00 Pomade A. Rossi everything rusty sending letter to nite Pendleton, Ore. Tragent."

Q. Now, Mr. Rossi, does that refresh your memory any?

A. I sent a telegarm but I never mentioned anything about a letter to Pendleton, Oregon. I don't understand that.

Q. That is just the reason I am reading it to you, to give you time to refresh your memory and get it right.

A. Yes, I sent telegrams, but that has nothing to do with this stamp case—the yeggs—absolutely not.

A. I bank at Ashley & Rumelin Bank as Angelo H. Rossi. I got the stamps at the U. S. Hotel, 2nd and Main streets, I think, in Whitey's room. There was no one present except Whitey and Johnny Bull.

MR. VEATCH: You say this fellow Stein was one of the fellows you attempted to sell to?

A. Yes, I asked him if he could use any and he said he would let me know, and then the secret service men came. I went to see a man previous to that named Sitton, but he wouldn't have anything to do with them. When I saw Mr. Sitton they were loose. I just told him that I have a few stamps; that he was kind of a speculator, and asked him if he could use them. He said, "Well, I'll look them up." He went to the Federal Reserve Bank and looked them up, and said they were not good, only on certificates, so I went back and got certificates. That same afternoon Walters came into the store and I gave the stamps to him.

VI.

The trial court erred over the objection and exception in permitting the following evidence testified to by Mr. P. A. Young, a witness for the government:

Q. Did Mr. Rossi make a statement before the

grand jury concerning the stamp transactions now under investigation?

A. He did.

Q. Will you state, Mr. Young, to the best of your recollection, what was said by Mr. Rossi at that time?

A. Mr. Rossi told us that he had several stamp transactions, and I believe he began with one with reference to Mr. Sitton. He said that he had received stamps from—

Q. Did Mr. Rossi say anything about where he got these stamps?

A. He told us that they came from Mr. Peterson.

Q. Did he make any statements as to where the transactions with Mr. Peterson took place?

A. The transaction, the first transaction, I believe, took place in his store.

Q. In Rossi's store?

A. In Rossi's store, and afterward took place in Mr. Peterson's room.

Q. Did he say anything about the time of day on which the second transaction took place in Mr. Peterson's room.

A. I think it was about seven o'clock in the evening.

Q. Did he say who was in the room at the time?

A. Yes, he said Johnny Bull, Mr. Peterson, and, I believe, he said that Russell Shawhan—

Q. State whether or not Mr. Rossi made mention

of any other stamps or bonds in Mr. Peterson's room, at the time he made this second purchase of stamps.

A. We were asking him in regard to whether he thought the stamps were stolen, and he said that on the dresser, as he passed by, he saw a $1000 bond and a $500 bond, and he suspected that they were stolen.

MR. GOLDSTEIN: What were stolen?

A. That the stamps and the bonds probably were stolen, that was his version of it.

Q. Did he say anything about getting any stamps from Peterson or any one else after this time?

A. Well, I could tell by referring to the notes, but I don't recollect it.

Q. Well, do you recall, Mr. Young, whether or not Mr. Rossi made a statement of the individuals to whom he had sold or delivered the stamps?

A. Yes.

Q. Whom did he mention?

A. He first mentioned Mr. Brenner and then Mr. Smith, and Mr. La Salle and Mr. Stein. I think that was all Mr. Rossi mentioned.

Q. Did he mention any one by the name of Mr. Sitton?

A. Yes, sir; but he told us that that transaction previous to this transaction with Mr. Peterson.

Q. He stated the Sitton transaction was previous?

A. Yes, and that the stamps that he gave to Mr. Sitton were stamps that he had purchased from other

parties; that they were on cards, I believe. And he also stated that he was borrowing money from Mr. Sitton from time to time and using these for that purpose.

Q. Did Mr. Rossi make any statement as to whether or not he had any conversation with Mr. La Salle concerning the stamps?

A. He said he had.

Q. Do you remember what Mr. Rossi said about that at the time?

A. I can't recall it. I know that it was Mr. Rossi's testimony that he had had some transaction.

VII.

That the trial court erred over the objection and exception of the defendant in permitting the said P. A. Young to refresh his memory as to such testimony by referring to notes that were not taken by said witness, on the ground that the best evidence was the testimony of the person who personally made said notes.

VIII.

That the trial court erred over the objection and exception of the defendant in not permitting the said witness P. A. Young to answer the following question:

Q. You didn't answer my question. Did Mr. Glover state that he had promised immunity to Mr. Rossi for the information he gave?

IX.

That the trial court erred in holding that the admissions of the defendant made before the said witness P. A. Young and before the grand jury were not induced or encouraged by the promise of immunity theretofore granted to said defendant.

X.

That the trial court erred over the objection and exception of the defendant in not permitting W. A. Glover, a witness for the defendant, to state what defendant had told him concerning a conversation had with Mr. Bryon regarding the matter of immunity.

XI.

That the trial court erred in denying the motion of the defendant to strike out the testimony of the government witnesses as to alleged admissions made to them by the defendant subsequent to the promise of immunity theretofore granted to him by W. A. Glover and Joseph Walters, U. S. Secret Service operatives.

XII.

That at the close of all the evidence in the case and after the court had ruled that the testimony of W. R. Bryon, a witness for the government, should be stricken out on the ground that the admissions made by the

defendant had been induced by the promise of immunity theretofore given to him, the trial court erred in failing to grant a mistrial on the ground of the highly prejudicial testimony of Bryon before the trial jury.

XIII.

That the trial court erred over the objection and exception of the defendant in permitting George H. Marsh, a witness for the government, to read in evidence in the government's case in chief, the record of a former conviction of one of the defendant's Fred Peterson, on the ground that such evidence was proof of another crime and thereby tended to prejudice all the defendants jointly indicted and tried with Peterson.

XIV.

That the trial court erred in charging the jury as follows:

"The only offense with which the defendants are charged, under the indictment, is that of conspiracy. That is the only cause on trial here, and you should confine your inquiry to that cause alone; and unless the defendants, or two or more of them, are guilty of that particular offense, they must be acquitted.

"You are not to understand, however, that you are not to take into consideration what the defendants, or any of them, have done, according as the evidence may

tend to show, conducing to their inculpation. You should examine very carefully all the competent evidence offered with respect to the declarations and acts and demeanor of all the defendants, as it relates to these war savings certificates and war savings certificate stamps, in order to ascertain, if possible, how they came into the possession of the defendants, or any of them, if they ever had such possession; as to whether they were falsely made or altered by them, or any of them, if at all; as to whether they were sold or transferred or received by them, or any of them; and as to whether they, or any of them, were uttered or passed as true and genuine; all for the purpose of determining whether the defendants, or any two or more of them, conspired together, as alleged, to commit these offenses, or any of them, or to defraud the United States."

XV.

That the trial court erred in charging the jury as follows:

"I further instruct you that a removal of the stamps from the certificates, if done with intent to defraud, would be tantamount to an alteration of a government obligation, and would, in effect, render it a falsely made certificate or obligation within the purview of section 148 of the Penal Code and would constitute a violation thereof."

XVI.

The trial court erred in charging the jury as follows:

"So if one should erase the registration number from the face of the stamp, or the owner's name from the certificate, with the intent to defraud, he would be guilty of an alteration of such certificate, and would commit the offense denounced by section 148."

XVII.

The trial court erred in charging the jury as follows:

"I instruct you, however, that the statement made by Rossi in giving evidence (before the grand jury) is not to be so disregarded by you. There is evidence tending to show that Rossi appeared before the grand jury voluntarily and of his own accord, and, although warned that whatever statement he might make would be used in evidence against him, he, notwithstanding, gave such evidence without insisting upon his immunity. The evidence, therefore, of Mr. Young, the foreman of the grand jury, was competent and pertinent to prove the admissions of Rossi with reference to the stamp transactions, and you are to regard these admissions for whatever tendency they may have, if any, to show Rossi's connection with the alleged conspiracy."

XVIII.

The trial court erred in charging the jury as follows:

"You will inquire whether the stamps were stolen, and if so, whether by either of the defendants. And in this relation I may say to you that the possession of recently stolen property affords a strong inference that the property was stolen by the person having it in his possession."

XIX.

That the trial court erred in charging the jury as follows:

"Now, gentlemen of the jury, the first question that you propound is the following: Does a stamp simply by being removed from a certificate, said certificate not being registered, become an altered stamp?

"To that I answer, that if the certificate has a stamp attached and the name of the party written upon the certificate, and the stamp thereafter has been removed with intent to defraud, then the defendant would be guilty whether the certificate or stamp was registered or not."

XX.

That the trial court erred in charging the jury as follows:

"The next question you ask is this: If defendants thought at the time that they were handling stolen stamps, but did not know they were altered registered stamps, could we find them guilty on this indictment?

"My answer to that is that if the defendants were handling these stamps knowing them to be stolen, and they handled them with intent to defraud the United States, then they would be within the purpose of this indictment."

XXI.

That the trial court erred in refusing to give the jury the following instruction:

"I also call Your Honor's attention to an instruction that I think might be misunderstood. Your Honor stated at the outset that these defendants are not on trial for the substantative offenses themselves. That is, that they are not on trial for receiving altered obligations or having in possession altered obligations, or passing altered obligations, but they are charged with conspiring to have these things and to do those things; but that they may consider the admissions and the demeanor of the defendants. I think that is a little confusing, in that it is my contention that the proof of a conspiracy cannot be predicated upon admissions of the defendants themselves as to any part in their transaction; that the proof of conspiracy must be established beyond an admission."

XXII.

That the trial court erred in refusing to give the jury the following instruction:

"If you believe that the confession made by Mr. Rossi to Mr. Young, foreman of the grand jury, was traceable to the hope inspired by the assurances made by Mr. Walters and Mr. Glover in the first instance; and that Mr. Rossi at the time was relying upon such assurances when he made the confession to Mr. Young, then such confession is inadmissible and you should disregard it. It is not material whether Mr. Young knew that Mr. Glover had inspired a hope in the mind of Mr. Rossi provided there was a casual connection between the hope aroused and the confession. The fact that the confession was not made to the officer arousing that hope is immaterial. When an improper influence has been exercised it becomes the duty of the government to show that it has been removed before this subsequent confession can be held admissible."

XXIII.

The trial court erred in refusing to give the jury the following instruction:

"The basis of the jurisdiction of the United States over these offenses is that it involves an obligation or other security of the United States which is alleged to have been altered, forged, or counterfeited. If the instrument alleged to have been so altered, forged, or counterfeited is not an obligation of the United States, then there has been no violation of these counterfeiting statutes. Before you can find, therefore, that the de-

fendants conspired to violate any of these statutes you must first of all determine to your satisfaction and beyond a reasonable doubt that the scheme alleged to have been devised by the defendants was one that had in contemplation the dealing in altered, forged, or counterfeited obligations of the United States. If the conspiracy did not have any such object in contemplation, then the scheme could not possibly have resulted in a violation of any of these statutes. In other words, if the defendants conspired to commit some offense that is not denounced by these specific statutes, or any of them, to-wit, sections 148, 151 and 154, then you cannot find any of these defendants guilty on this charge, and your verdict would under those circumstances have to be that of not guilty, so far as this particular charge is concerned."

XXIV.

The trial court erred in refusing to give the jury the following instruction:

"When and under what circumstances can the instruments alleged in the indictment to have been the subject of the alteration be considered as the obligations of the United States? I instruct you that a United States War Savings Stamp becomes an obligation of the United States only when it has been affixed to a United States War Savings Certificate and the name of the owner has been written upon that certificate. It is only when such a certificate is so made up and com-

pleted that it becomes an obligation of the United States within the meaning of the counterfeiting statutes herein involved."

XXV.

The trial court erred in refusing to give the jury the following instruction:

"If you should find, therefore, after a review of all the testimony in this case, that the prosecution has not convinced you beyond a reasonable doubt that the object of the conspiracy was to alter or forge such obligations of the United States, as I have defined them, then it would be your duty to return a verdict of not guilty as to such defendants you find had not so conspired. In other words, if certain of the defendants entered into a conspiracy, assuming that there was a conspiracy, merely to buy, receive, possess, or sell loose war savings stamps, then they could not be said to be guilty of this offense, as such war savings stamps, considered separately, are not obligations of the United States."

XXVI.

That the trial court erred in refusing to give the jury the following instruction:

"It is further charged in the indictment that the defendants conspired to forge and alter obligations of the United States by removing a certain serial or identification number from the face of the stamps. Upon that

point I instruct you that it is not an alteration or forgery of a United States war savings certificate, assuming that it was fully and completely made up so as to constitute an obligation of the United States, to erase or remove the serial number therefrom, as such serial number is not a material element of the obligation. The obligation is just as potent in the hands of the holder without as with the serial number. It is only when the certificate has been duly registered that the removal of the registration number therefrom would constitute a forgery. It is not charged in the indictment, however, that the conspiracy included the scheme of altering stamps or certificates that had been registered. That being the case I instruct you that under this indictment there has been no proof that obligations of the United States had been altered by the removal of the registration number therefrom."

XXVII.

That the trial court erred in refusing to give the jury the following instruction:

"I also instruct you that it is unfair and improper to consider anything you may have heard or read concerning this case outside this court room to influence you in arriving at your verdict. Your verdict should depend upon the sworn testimony that you have heard here, and upon that testimony only. It appears that a number of articles were written concerning this case which might

possibly have a tendency to detract from the testimony as here given under oath. If you have heard or read anything about this case outside this court room it is your duty under your oath to disregard it entirely. It is not only unfair to the defendants that you should entertain any prejudice against them for something that you may have heard or read outside this court room, but it is likewise a contempt of court to publish such matters of a pending trial. I therefore remind you of your duty under your oath and appeal to your conscience to consider only the evidence given in this case, and none other. If, therefore, you honestly feel that the evidence as presented in this case is insufficient to convince you beyond a reasonable doubt of the guilt of the defendants, then it is your duty to return a verdict of not guilty, notwithstanding the fact that if you considered the statements in the newspapers your decision would have been otherwise. I also instruct you that your verdict must be based upon the guilt or innocence of these defendants on this charge, and none other, no matter what your opinion may be concerning their guilt upon any other charge or offense. If, therefore, you honestly feel that the evidence as given in this case is insufficient to convince you beyond a reasonable doubt of the guilt of the defendants in conspiring to violate the counterfeiting statutes, then it is your duty to return a verdict of not guilty, notwithstanding you might believe them guilty of some other offense."

XXVIII.

That the trial court erred in refusing to grant defendant's motion to strike out the testimony of P. A. Young as to admissions made by the defendant before him and the grand jury, on the ground that it was an involuntary statement made and induced by the promise of immunity.

XXIX.

That the trial court erred in denying the motion for a new trial on behalf of the defendant in this, to-wit:

(a) That the record fails to show that the defendant has pleaded to this indictment as required by law, and, therefore, no issue being had there was nothing for the jury to try;

(b) That the defendant was prejudiced at the outset of the trial and during the course of the trial by articles appearing in newspapers then and there published and generally circulated in the City of Portland, Oregon, where said cause was being tried, which said articles were of such a nature as to arouse public prejudice against this defendant, and were thereby calculated to prejudice the jury against him;

(c) That the defendant was prejudiced by remarks of the court made during the course of the trial.

XXX.

That the defendant did not have a fair and impartial trial by reason of the prejudice aroused against him during the course of the trial by articles appearing in newspaper published and circulated in the City of Portland, where said cause was being tried.

XXXI.

That the defendant did not have a fair and impartial trial by reason of the following prejudicial remarks of the court made during the course of the trial, to-wit:

"During the examination of William Glover, a witness for the defendant and a former United States secret service operative, when questioned by the attorney for the defendant, testified as follows:

"Q. Did you come to me and ask me to put you on the stand?

"A. I did, sir, night before last.

"Q. Why did you ask that?

"A. When I saw—the reason for asking you to put me on the stand—I saw that Mr. Veatch was not going to put me on the stand so I could explain away some of this newspaper notoriety that has been filtering here for the last six months; so I came to you and requested you to give me a chance to get the truth before this court and my friends here.

"Q. This was a personal request of me as a friend of yours?

"A. Yes, absolutely."

Whereupon the court intervened as follows:

"COURT: Who is your friend?

"A. Well, I have friends all over the coast, your honor.

"COURT: I thought you meant Rossi."

XXXII.

That the trial court erred in denying and overruling the motion of the defendant in arrest of judgment in this, to-wit:

1. That the said indictment is duplicitious in that two offenses are charged or attempted to be charged therein;

2. That the said indictment does not state facts sufficient to constitute an offense or a crime against the laws of the United States;

3. That no issue has been joined herein in that the defendant has never pleaded in this indictment; and that because of which said errors in the record herein, no lawful judgment can be rendered by the court upon the record in this case.

XXXIII.

That the trial court erred in entering judgment against the defendant, upon the ground that he had never pleaded to the indictment, and that therefore no issue had been joined.

XXXIV.

That the trial court erred in entering judgment against the defendant upon the verdict in this case.

ARGUMENT.

1. Insufficiency of Indictment.

The grounds upon which the demurrer is predicated are two-fold: (a) That the indictment fails to state sufficient facts to constitute an offense against the laws of the United States; and (b) that the indictment is duplicitious.

(a) The indictment which is in one count purports to charge all the defendants named therein with a conspiracy to violate Sections 148, 151 and 154 of the Penal Code, and to defraud the United States in violation of Section 37 of the Penal Code. The particular statutes the defendants are alleged to have conspired to violate are as follows:

Section 148. Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation

or other security of the United States shall be fined not more than five thousand dollars and imprisoned not more than fifteen years.

Section 151. Whoever, with intent to defraud, shall pass, utter, publish or sell, or attempt to pass, utter, publish, or sell, or shall bring into the United States or any place subject to the jurisdiction thereof, with intent to pass, publish, utter or sell, or shall keep in possession or conceal with like intent, any falsely made, forged, counterfeited, or altered obligations or other security of the United States, shall be fined not more than five thousand dollars and impriosned not more than fifteen years.

Section 154. Whoever shall buy, sell, exchange, transfer, receive, or deliver any false, forged, counterfeited, or altered obligation or other security of the United States, or circulation note of any banking association organized or acting under the laws thereof, which has been or may hereafter be issued by virtue of any act of Congress, with the intent that the same be passed, published or used as true and genuine, shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both.

In so far as it relates to the conspiracy part thereof which, of course, is the gist of the offense, the indictment in substance charges that the defendants conspired to alter certain obligations of the United States, to-wit: U. S. War Saving certificates and U. S. War Saving certificate stamps, by removing the stamps from the certificates and by erasing from the face of the stamps certain registration and identification numbers; the conspiracy further contemplated a scheme to buy, possess and sell these instruments so altered with intent to defraud the United States.

The authority for the contention of the Government in claiming that the instruments in question are obligations of the United States, and therefore subject to the protection of counterfeiting statues which the defendants are said to have conspired to violate, is found in Section 6 of the Act of Congress of September 24, 1917, (40 Stat. 288, 291) which reads as follows:

"War Savings Certificates.—In addition to the bonds authorized by section one of this Act and the certificates of indebtedness authorized by section five of this Act, the Secretary of the Treasury is authorized to borrow from time to time, on the credit of the United States, for the purpose of this Act and to meet public expenditures authorized by law, such sum or sums as in his judgment may be necessary, and to issue therefor, at such price or prices and upon such terms and conditions as he may determine, war saving certificates of the United States, on which interest to maturity may be discounted in advance at such rate or rates and computed in such manner as he may prescribe. Such war saving certificates shall be in such terms and conditions, and may have such provisions for payment thereof before maturity, as the Secretary of the Treasury may prescribe. Each war saving certificate so issued shall be payable at such time, not exceeding five years from the date of its issue, and may be redeemable before maturity, upon such terms and conditions as the Secretary of the Treasury may prescribe. The sum of such war saving certificates outstanding shall not at any one time exceed in the aggregate $4,000,000,000. It shall not be lawful for any one person at any one time to hold war saving certificates of any one series to an aggregate amount exceeding $1,000. The Secretary may, under such regulations and upon such terms and conditions as he may pre-

scribe, issue, or cause to be issued, stamps to evidence payments for or on account of such certificates."

It will be here noted that it is not claimed that the defendants conspired to violate this statute last quoted, but that the defendants conspired to violate the hereinbefore described counterfeiting statutes.

It is the contention of the defendant that the indictment is insufficient for the following reasons:

(1) That neither a U. S. War Savings Certificate nor a U. S. War Savings Certificate stamp is an obligation or other security of the United States.

(2) That the alleged alteration contemplated by the conspiracy is not an alteration within the meaning of the counterfeiting statutes;

(3) That the indictment fails to allege that the instruments in question were registered or that the scheme contemplated the alteration of registered U. S. War Savings Certificates, and therefore the alteration could in no wise perpetrate a fraud upon the United States.

(4) That the indictment fails to allege wherein the defendants disobeyed any regulations promulgated by the Secretary of the Treasury, and that in any event the transgression of any such regulations is not a criminal offense unless made so by the statute itself.

(1) It is elementary that before the United States courts can be said to have jurisdiction in counterfeiting cases, the instrument involved must be an obligation or other security of the United States, and the first point we raise is that there is nothing in the indictment from which the court can say that U. S. War Savings Cer-

tificates or U. S. War Savings Certificate stamps, considered separately and individually, are such obligations of the United States as to render them subject to the protection of the counterfeiting statutes. As a matter of fact the only instruments which the plan or scheme contemplated being altered were the U. S. War Savings Certificate stamps; i. e., by their removal from the certificates to which they had been attached and by the erasure of certain identification numbers appearing thereon.

It is our contention that the stamp itself is insufficient to constitute an obligation within the contemplation of this Act. It will be observed that the act authorized the issuance of United States War Saving *Certificates*, and that stamps merely evidence the payments made on account of such certificates; furthermore, by a regulation duly and lawfully promulgated by the Secretary of the Treasury, under date of December 18, 1918 (Department Circular 128), it is specifically provided:

"A United States War Saving Certificate, series of 1919, will be an obligation of the United States when, and only when, one or more United States War Saving Certificate Stamps, series of 1919, shall be affixed thereto."

It is, therefore, quite apparent that so far as war saving stamps and certificates are concerned, Congress, in passing the law, and the officers charged with the enforcement thereof, decreed that separate and alone,

neither represented an obligation of the United States, but that jointly, the certificate with the stamps thereon, constituted such an obligation.

As the indictment in effect charges that the stamps alone constituted the obligation which was said to have been altered, forged and counterfeited, when the law and regulations under which the stamps were issued specifically provides that, that in itself it does not constitute an obligation of the United States, the indictment therefore does not properly state an offense.

In the case of DeLemos vs. United States, 91 Fed. 497, the Circuit Court of Appeals for the Fifth Circuit directed the quashing of the indictment purporting to charge the forging of an endorsement of a Government draft, on the ground that the indictment failed to charge that the genuine draft with the forged endorsement constituted together a forged obligation of the United States.

So, in the case at issue, the pleader should have alleged that the genuine or altered certificate, with the alleged altered stamp constituted together an obligation of the United States that had been forged or counterfeited. This he has failed to do.

Furthermore, before a United States War Savings certificate and stamp jointly could be considered an obligation of the United States, the certificate must be complete. That is to say, it must bear the name of the owner

thereon, which must be written upon the certificate at the time of the issuance thereof. No where in the conspiracy charged in the indictment is there any such allegation from which the court could say that the certificate was a completed one, so that it, together with the stamps attached thereto, constituted an obligation of the United States.

Department Circular No. 94, bearing date of November 15, 1917, declares that "No War-Saving Certificate will be issued unless at the same time one or more War-Savings Certificate Stamps shall be purchased and affixed thereto, but no additional charge will be made for the War-Savings Certificate itself. The name of the owner of each War-Savings Certificate must be written upon such certificate at the time of the issue thereof."

So far as the bare certificate itself is concerned, our assertion that it is a mere worthless piece of pasteboard will not be seriously disputed. Plainly it only becomes important when it bears the name of the owner, and when the stamp, which after all, is the thing of value, is attached thereto. This was in effect the ruling of Judge Wolverton when called upon to determine the sufficiency of an indictment against this defendant for the same substantive offenses, which were made the basis of the conspiracy indictment. In U. S. vs. Rossi, 266 Federal Reporter, at page 622, the learned judge held:

"In the light of the act and the department regulations, provision is made for the issuance of two kinds of documents, namely, War-savings Certificates and War-savings Certificate stamps; but these documents become obligations of the United States only when a stamp or stamps shall have been affixed to the certificate and the name of the owner or owners shall have been written upon the certificate. Such certificates, when so made up and completed, it may be confidently affirmed, are obligations or securities of the United States within the purview of sections 148, 151, and 154 of the Penal Code. Separately considered, neither the stamp nor the certificate can be deemed such an obligation."

(2) Again we call attention to the palpable insufficiency of the indictment purporting to charge a conspiracy to alter obligations of the United States, as condemned by the counterfeiting statutes, when there is nothing in the indictment from which the court could say that the instruments in question were altered or that they could be altered by the means alleged so as to make it an offense against the counterfeiting statutes, which this defendant is said to have conspired to violate.

As previously noted, the only instruments said to have been altered or designed to be altered were the United States War Savings Stamps. Assuming for the sake of argument, a premise we do not concede, that a United States War Savings Stamp standing alone is

an obligation of the United States within the meaning of the act under which it was issued, it would further be necessary before the so-called counterfeiting statutes can be said to have been violated that such stamp had in fact been altered by the means alleged in either of the ways charged, that is, by the removal of the stamp from the certificate to which it had been attached or by the erasure of the serial or identification number from the face of the stamp. It is our contention that in neither instance would such an act constitute such an alteration as denounced by the counterfeiting statutes.

As to the first charge that the removal of the stamp from the certificate to which it had been attached was an alteration: In the case of U. S. vs. Howell, 11 Wallace 432, the Supreme Court said, "The use of the words 'false, forged and counterfeited' in the statutes imply therefore, when applied to any of the obligations of the Government, that it purports to be such an instrument, but is not genuine or valid."

The Act of September 24, 1917, authorizing the issuance of these stamps, does not declare that the removal of same from the certificate to which they had been attached, a crime, nor do the regulations themselves prohibit it. It must, therefore, be assumed that the Government contends that the counterfeiting statutes can be invoked on the theory that the act of removing the stamps from the proper certificate, rendered such stamps worthless and valueless in the hands of the holder.

It will not be denied that the certificates alone are without any value and are gratuitously given by the Government for the personal convenience of the owner as a holder for such stamps merely; it would, therefore, appear that the stamps alone are the unit of value, and as such may be alienated, sold or disposed of as any other property. The Government, after the original purchase of these stamps, can claim no property interest in the stamps; by the same token, the defendant could properly purchase them from the original purchasers. Being the owners of these stamps the defendants could change them from one certificate to another, provided the Government did not have to pay more than it was obligated to pay on these stamps. There is no contention that the value of the stamps was in any way affected by the removal of these stamps to other certificates.

To hold that the removal of the stamp from the certificate constituted an alteration would in effect be equivalent to holding that the stamp itself was valueless, and thereby to destroy all property value in the loose stamps or in those that had been transferred from one pasteboard certificate to another.

Such was the Government's contention in an indictment recently brought by it in the Southern District of New York. One Sacks was indicted in that district for violation of the counterfeiting statutes in that he altered a War Savings Certificate by removing the stamp therefrom. Motion was made to quash the in-

dictment on the ground that such act did not constitute an alteration within the meaning of the counterfeiting statutes. In view of the dearth of reported cases upon the subject of War Savings Stamps, and the importance of this decision upon the grounds involved herein, a full copy of the memorandum decision quashing the indictment is set out in the appendix. District Judge Hough in disposing of the particular question now raised said:

"The statement of the prosecutor in support of especially Section 14 of Circular 108, is that a stamp in and of itself is nothing; it has no value except as a receipt.

"From this flows the assertion that when that receipt is affixed to a pasteboard, which by itself has no value whatever, the two things put together become an obligation of the United States, not dissimilar from a bond or a treasury note and that the quality or assignability or transferability is denied to it.

"It is said even if the stamp *per se* worthless may pass from hand to hand, it becomes when affixed to the certificate like the ink upon the note, and its removal is as much an alteration as would be the erasure of that ink.

"To me this is an ingenious but fallacious arrangement of words.

"To deny value to the War Saving stamp is against common sense and contradictory to a course of business vigorously pursued for the last few years, which has succeeded in forcing these stamps into the possession of people whom it is sarcasm to call 'investors,' and who would be surprised beyond measure to be told that their stamps had no 'value.'

"When Congress authorized the issuance of 'stamps to evidence payments for on account of such certificates,' and did not deny to the stamp holders the right of trans-

fer, such right existed. The Treasury has sought to take it away by making the certificates non-transferable. Assuming that power exists to prohibit transfer of the certificates, I am wholly unable to perceive that there is any Congressional authority for the Secretary's prohibiting the transferability of the stamps affixed to the certificates.

"Nowhere is it said that any particular stamp shall evidence a payment on any particular certificate.

"This I think is the gist of the matter: Is a regulation which as interpreted, in terms takes away a property right in a manner not specifically authorized by statute, a valid rule? I cannot persuade myself that such is the case.

"Congress has certainly not done that which was held sufficient to make a crime of rule violation in United States vs. Grimaud, 220 U. S. 506. The Smull and Morehead cases, *supra,* doI think hold that where the manner of obtaining a grant is committed to a department, that department may regulate the procedure to obtain the same, and if a violation of that procedure runs counter to any criminal statute of Congress, then violation of the regulation is punished by the statute, and so within the Grimaud case, *supra.*

"But the prohibition against transfer of stamps affixed or unaffixed is far more than a procedural regulation. A stamp is a thing of value, bought and paid for, and to deprive it of the quality of assignability is a diminution of lawfully existing property rights for which in my judgment congressional action alone will suffice."

This reasoning of Judge Hough finds approval in the United States Supreme Court in the case of United States vs. Eaton, 144 U. S. 677, wherein it was held that the violation of a regulation made by the head of a department for carrying into effect a law of the United

States cannot be made a criminal offense, unless the statute so provided. In that case the Court said:

"Regulations prescribed by the head of departments under authority granted by Congress, may be regulations prescribed by law so as lawfully to support Acts done under them and in accordance with them, and may in themselves have in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen where the statute does not directly make the neglect in question a criminal offense."

As to the Second charge: That the erasure of the registration or identification number from the face of the stamp constituted an alteration:

It is elementary that the alteration, forgery or counterfeiting in order to be criminal must be material and must be capable of effecting a fraud. It follows, therefore, that an immaterial change, and one which if true, does not alter its effect or make it speak in a different legal language, or in anywise decrease, diminish or discharge the obligation, does not amount to forgery or counterfeiting.

The offenses here charged purport to be that of forgery and the decisions in forgery cases are therefore applicable.

"In order that an alteration may constitute forgery, it is essential that it be material."

19 Cyc. 1375.

"A material alteration is one which changes the legal effect of an instrument, while an immaterial alteration has no such effect."

1 R. C. L. 966.

"A material change or alteration of an instrument is one which causes it to speak a language different in legal effect from that which it originally spoke."

2 C. J. 1173.

"An alteration is an act done upon an instrument by which its meaning or language is changed. If what is written on or erased from an instrument has no tendency to produce this result, or to mislead any person, it is not an alteration."

2 C. J. 1172.

"The materiality of an alteration is a question of law for the court to determine."

Notes to Wilson vs. Hayes, 4 L. R. A. 197.

"Nor is the intent with which an alteration is made to be considered in determining its materiality and its consequent effect upon the validity of the instrument altered. An alteration of an instrument may be considered immaterial if it does not vary the meaning of such instrument in any essential particular."

1 R. C. L. 969.

Bearing these fundamental principles in mind as to what constitutes a material alteration in order to make out a case of forgery, we observe that the indictment purports to charge such forgery upon the theory that the defendants erased a certain serial number appearing on the face of the stamp, which, for the purpose of this argument, we shall assume is an obligation of the United States. There is no contention or allegation that the value of the stamp was thereby in any way enhanced, di-

minished or discharged. We therefore submit that an essential ingredient to the offense of forgery is lacking.

In the case of People vs. Levinger, 1912 D. Ann. Cases 239, it was held that the alteration of certain figures on a check which did not change the legal effect of the instrument was not a material alteration and did not constitute a forgery. Under the notes to this case appears the following:

"Forgery is the false and fraudulent making or alterating of an instrument which would if genuine, impose a legal liability in another or change his legal liability to his prejudice. An alteration, to amount to forgery, must be such as to make it speak a language different in legal effect from that which it orginally spoke, or which carries with it some change in the right, interest or obligations of the parties to the writing. It follows that an immaterial change—a change which if true would not affect the legal liability of the parties in an action,—to the instrument would not amount to forgery."

In the case of State vs. Henry, 54 L. R. A. 794, it is said:

"As the crime in this case is charged to have been committed by means of an alteration of a genuine written instrument. It must, therefore, be clearly made to appear that the alleged alteration of the genuine document was material and that its legal effect was thereby in some degree varied or changed to the prejudice of some person having or acquiring rights therein for the law is well settled that forgery cannot be sufficiently predicated upon an immaterial alteration of a written instrument."

Under the note to Citizens National Bank vs. Williams, 35 L. R. A. 467, is found the following:

"The alteration of a serial number on a negotiable bond or bank note is not a material alteration. The test is whether the alteration makes the instrument a new note and not whether the new note was more or less beneficial to the obligors."

A discussion of this subject is found in 1 R. C. L. 967, and the following found therein is authority for our contention:

"The test as to materiality: That is a material alteration which so changes the terms of the instrument as to give it a different legal effect from that which it originally had, and thus work some change in the rights, interests or obligations of the parties. It is the effect of the act upon the instrument, and not the particular manner in which it is done, that is material, whether it be by interlineation, addition or substitution, change of words, erasure, or by cancellation of some material provision thereof."

In the United States Courts it has been held that the mere changing of serial numbers on instruments such as bank notes or a negotiable bond is not considered material at least where the law does not require such instruments to be numbered. (1 R. C. L. 983.)

The decisions of the United States Courts rests upon the ground that the number put on a negotiable instrument is not an integral part of it but, like a vignette or other marking, only serves to identify, and if the instru-

ment is otherwise fully identified a change in the number is immaterial.

The case of Wylie vs. Missouri Pacific Ry. Co., 41 Fed. 623, is a Federal authority, in point. This was an action brought to recover money due on certain bonds that had been stolen from the plaintiff. The numbers on the bonds had been altered by erasure and substitution of other numbers and had thereafter gotten into the hands of a bona-fide holder. The case resolved itself in a single question of law: Whether the alteration of a serial number on a negotiable bond was a material alteration? If it was, it discharged the obligation in the hands of the innocent purchaser and the plaintiff would thereby be enabled to recover; but the court held that the alteration was not material and that plaintiff could not recover. In his opinion the court said:

"The number upon a note, check or bond is one intended to serve the convenience of the maker or owner in distinguishing it from others of a similar tenor; that the serial numbers were a matter extrinsic to the contract itself, and for that reason it might well be considered, that the alteration of the numbers is not a material one."

The court in its opinion quoted with approval a number of supporting decisions, among them that found in the case of Com. vs. Bank, 98 Mass. 12, wherein the court in discussing the argument that the numbers on the bonds constituted a part of the instrument, said:

"It is a part of the identity of the paper, but not of

the contract any more than any device, picture or impression upon it would be. The presence or absence of any number does not change the written contract in substance or in form, nor effect the proof of it. We think the change of the numbers was not a material alteration of the bond."

Also the court quoted the decision of the case of City of Elizabeth vs. Force, 29 N. J. E. 587:

"The number of a bond is put upon it as a mark denoting, for the convenience and protection of the maker, that it is one of a series, but such mark does not enter into or in any way affect the agreement embodied in it. The purchaser has nothing to do with it and need give it no heed."

In the case of Com. vs. Hayward, 10 Mass. 34, it is said:

"An alteration of a bank bill, in order to be criminal, must be such an alteration as effects the apparent value of the bill."

Finally, we submit the opinion of Judge Wolverton in the case of United States vs. Ross, *supra,* when these authorities were called to his attention upon this point:

"I am of the opinion that it is not an alteration or forgery of such War-saving Certificates, fully made up, to erase or remove the serial number thereof, because such serial number is not a material element of the obligation. The obligation is just as potent in the hands of the holder without as with the serial number. But if the certificate had been registered, as provided by the departmental regulations, and given a registration number, it would, without question, constitute a forgery.

"The purpose of affixing the number or numbers is for identification of the obligation at the post office where payable and for the protection of the Government, to ward against payment to the wrong person, or double payment, as well as for the protection of the lawful owner and holder of the certificate or certificates.

"And those counts purporting to charge the defendant with having erased or effaced the registration and identification number, to-wit, number 50819, are also bad, in not having alleged by appropriate averments, that such certificates had been previously registered."

Here the indictment makes no charge that the conspiracy contemplated a scheme of dealing in registered stamps, nor that the stamps involved were registered, but merely refers to the number which is said to have been erased, to-wit: 50819, as the registration or identification number. It will be conceded, and the Bill of Exceptions so demonstrates, that that number is the regular post office serial number under which the Scio post office operates, and is not the registration number, therefore, under the indictment and the proof, it appearing that the number 508919 is merely the serial number, the removal of which in no wise affects the value of the stamp itself, it must follow, if the above authorities are decisive, that such a removal does not constitute a material alteration within the meaning of the counterfeiting statutes.

3. It is further contended that as the stamps in question were not registered the indictment fails to allege any facts from which the court could say that the

alteration of such stamps by the means alleged could in any possible manner perpetrate a fraud upon the United States.

Treasury Department Circular No. 94, which provides for the registration of War Savings Stamps, declares:

"Unless registered the United States will not be liable for the payment in respect of any certificate or certificates made to a person not the rightful owner thereof."

It must therefore follow that if the stamps in question were not registered, and this plainly appears from the indictment and the proof, that no dealing by the defendants with such non-registered stamps could involve a fraud upon the United States and in so far as this transaction is concerned the defendants could not be indicted for same under Section 37 of the criminal code.

In connection with this assertion we call attention to the fact that no where in the indictment is it alleged that the conspiracy included any pecuniary loss to the United States directly or indirectly.

If it be held that a War Savings Stamp is property in the ordinary sense of the word and may pass from hand to hand like any other similar piece of property, and if it be held that the removal of the serial number from the face of the stamp is not a material alteration, how could it be argued that any fraud could possibly

be perpetrated upon a department of the Government which only obligates itself to the rightful owner of such stamps when and only when they have been duly registered.

The purpose of the act of September 24, 1917, Section 6, as stated in the title was to obtain a revenue. This purpose was effectuated when the stamps were purchased. The Government had acquired the desired revenue from the sale of these stamps and became obligated to pay the value of these stamps only to the holder thereof. It was not liable over again to the lawful owner unless as before stated the stamps had been duly registered. As far as the Government was concerned it lost no property or rights by the transfer of these stamps from one party to another, or even by disposition of these stamps through dishonest channels so long as the parties in dealing with them did not materially alter the same so as to constitute a forgery of a Government obligation. It is submitted, therefore, that by the mere removal of the identification number from the face of a non-registered stamp, not amounting to a material alteration thereof, the Government could not possibly be defrauded thereby. The Department had already received the revenue therefrom, and assuming that the charge in the indictment was true, it would not have had to pay a single cent more in redeeming the stamp from a dishonest holder of such stamps than it would have had to pay to the lawful owner thereof.

4. It may be contended, however, that the alteration of these obligations were such as might be capable of perpetrating a fraud upon the United States because of non-compliance with certain regulations of the Secretary of the Treasury; that regulations had been promulgated prohibiting alienation of these stamps and certificates from the original purchaser, and that the acquisition of these stamps by parties other than the original purchaser was prohibited.

In the first place, there is no allegation in any count of these indictments that the defendants in doing the things alleged had failed or neglected to comply with any regulation of the Treasury Department; that not having pleaded the non-compliance with certain regulations, nor when they were promulgated, nor that they were known to the defendants, nor that they were in effect at the time of the alleged violation, the Government cannot now urge that the facts embrace a non-compliance of such regulations.

Even in the event that such regulations had been properly pleaded, it is contended that the Act of September 24, 1917, nowhere confers upon the Secretary of the Treasury the power to declare unlawful a violation of any of such regulations so promulgated under the authority of said statute.

The words of the Act of Congress of September 24, 1917, Section 6, in this connection are that "it shall not

be lawful for any one person at any one time to hold War Savings Stamps to an aggregate amount exceeding $1000," and the further provision "The Secretary of the Treasury may under such regulations and upon such terms and conditions as he may prescribe issue stamps to evidence payment for or on account of such certificates."

It is then declared by Department Circular No. 94 that "War Savings Certificates are not transferable and will be payable only to the respective owners named thereon," except in the events not now material.

The statute in question does not in express terms make it a crime to alienate or acquire by purchase War Savings Stamps and War Saving Certificates. If it is held to be unlawful, it can only be so held by virtue of clauses in the statute conferring power on the Secretary of the Treasury to make terms and conditions. If this power so conferred is held to be broad enough to make it criminal to violate any rule thereafter to be made by the Secretary of the Treasury under such statute for the carrying out of the purposes of the statute, it is void for the reason that it would be an attempt by Congress to delegate its authority to an executive officer. The reason is obvious. To hold an alleged violation of these regulations as sufficient to sustain the indictment would be equivalent to holding that the clauses conferring power to impose terms and conditions and to regulate also make it a crime to violate such regulations.

Such a construction would make of the enabling clauses of the Act, in substance and effect, a delegation of legislative power to an administrative officer.

In U. S. vs. Moody, 164 Federal, 269, the court said:

"It is elemental that Congress cannot delegate legislative authority to an executive officer or board and that accordingly such executive officer cannot amend or extend a law of Congress so as to make an act unlawful which but for the action of the executive officer, would be lawful. In other words that a sufficient statutory authority must exist for declaring an act or omission unlawful."

In U. S. vs. Eaton, 144 U. S. at page 688, the court said:

"Regulations prescribed by the President and by heads of departments, under authority granted by Congress may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing required by law as to make the neglect to do the thing, a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

It is well stated in the case of U. S. vs. Van Wert, 195 Fed. 974:

"Unless the act charged to have been done by the defendant is a violation of some Act of Congress * * * or of some departmental rule or regulation authorized by Congress, the violation of which is declared by

Congress to be an offense, no crime has been committed."

It must, therefore, be conceded that a violation of a departmental regulation is not a criminal offense unless Congress distinctly makes it so. This Congress has not done except in the one instance hereinabove stated, which does not cover any of the acts charged against these defendants.

It would be a very dangerous principle to hold that an act prescribed by the Secretary of the Treasury as a regulation under the Act of September 24, 1917, and for carrying it into effect, could be considered as "unlawful" in such a manner as to become a criminal offense punishable under the conspiracy statute, particularly when the Act does not so prescribe. In Congress intended to make it a criminal offense, it would have done so distinctly, in connection with the enactment of the Act of September 24, 1917.

The Act does not expressly forbid the sale of war savings stamps by the original purchaser thereof to other persons. It would seem that it is no crime to purchase or sell War Saving Certificates, within the limitations thus laid down. As Congress did not specifically forbid alienation and acquisition of War Savings Certificates, nor declare the sale and purchase of such securities by and between citizens to be unalwful or a crime, and since Congress could not delegate the au-

thority to legislate in respect to these securities to the Secretary of the Treasury, the regulations in question, in so far as they would make the purchase and sale of these securities by and between the lawful owners and other citizens a criminal offense, are in the nature of an amendment to the statute and a limitation of the rights of a citizen under and in respect to the enabling statute and are therefore void. The contention here submitted is upheld by District Judge Hough in the case of U. S. vs. Saks, supra, wherein he said:

"This I think is the gist of the matter: Is a regulation which as interpreted, in terms takes away a property right in a manner not specifically authorized by statute, a valid rule? I cannot persuade myself that such is the case.

"Congress has certainly not done that which was held sufficient to make a crime of rule violation in United States vs. Grimaud, 220 U. S., 506. The Smull and Morehead cases, *supra,* do I think hold that where the manner of obtaining a grant is committed to a department, that department may regulate the procedure to obtain the same, and if a violation of that procedure runs counter to any criminal statute of Congress, then violation of the regulation is punished by the statute, and so within the Grimaud case, *supra.*

"But the prohibition against transfer of stamps affixed or unaffixed is far more than a procedural regulation. A stamp is a thing of value, bought and paid for, and to deprive it of the quality of assignability is a diminution of lawfully existing property rights for which in my judgment congressional action alone will suffice."

In the recent case of Keane vs. U. S. 272 Federal 577, the Circuit Court had for consideration an indictment for conspiracy involving a scheme to defraud the United States through dealing with a post exchange, operated under certain rules and regulations of the War Department. The decisive question was whether a post exchange is such an institution as that a fraud upon the United States could arise from or be involved in any transaction concerning it. As stated by the Court:

"Plainly it will be seen that, if it is not such an institution, then no dealing by the defendant Keane with such exchange could operate as or involve a fraud upon the United States, and in so far as this transaction is concerned the defendant could not be indicted for same under section 37 of the Criminal Code above quoted."

In reaching its conclusion that the post exchange was not such a department of the Government as would render a fraud perpetrated thereunder a fraud upon the United States, the Circuit Court said:

"It will not do to say that because the Secretary of War permits the establishment of post exchange baseball clubs and golf clubs, immediately upon the establishment of same, transaction with them or their agents are covered by this criminal section. If the Secretary of War had this power, then every new organization or association which he might permit the soldiers to organize would in its transactions with civilians come under the protection of this highly criminal law, because, if he can create new conditions, which immediately become subject to these criminal laws of the country, his action

would be tantamount to giving him the authority to enact a criminal statute." * * *

"This section, Sec. 161 U. S., only gives the heads of departments, including the Secretary of War, power to issue rules and regulations for the administration of their departments. Indeed, the power conferred by this section is administrative only, which means that the Secretary of War, if he had power to issue the regulation at all, only had power to compel or permit the soldiers to establish these post exchanges in question, but could not, in the absence of the express authority of Congress, make persons not connected with his department bound by such regulations, or subject to the pains and penalties of criminal law. If a head of a department has the power to make rules which subject classes of property to forfeiture and classes of persons to penalties, that power must be expressly given him by Congress, and well defined, so as to make his rule or regulation an act of the supreme law-making body. He will get no such power from Section 161 of the Revised Statutes.

In the case of Oertel Company vs. Gregory, 270 Fed. 789, there was involved the right of the Commissioner of Internal Revenue to promulgate a certain regulation for carrying out the provisions of the National Prohibition Act. The Commissioner had issued a regulation declaring that the use of the words "lager, bock or stout" was not permissible on labels for cereal beverages. The prohibition act itself had denominated the beverages subject to regulation as beer, ale and porter. It was contended that the regulation issued by the Commissioner was not authorized by the prohibition act, nor by any act of Congress. The Court sustained this contention in the following language:

"If Congress had deemed it proper to put into the Volstead or other act the language used in the new regulation, of course no objection could then have been made to it, but Congress did not do so, and in this situation the Commissioner undertook to supply what he must have supposed was a defect in the legislation. If Congress had chosen to add the words 'beer, ale, or porter,' the words 'or any synonym for same, such as 'lager, bock or stout,' the regulations might have been authorized, but in the absence of those words from the act the rules plainly established by the Supreme Court make it clear that the Commissioner could not, even with the approval of the Secretary of the Treasury or otherwise, add those words to those used by Congress in the legislation it enacted, and the attempt to do so must be held to have been unauthorized by law, and consequently not enforceable as against the plaintiff in this case. Congress, of course, could, if so desiring, have those additional words, and, better still, might also have explicitly said what words should be regarded as synonyms, and not have left it to the conjectures of each new Commissioner of Internal Revenue or Secretary of the Treasury, or other executive officers, to enforce their possibly varying views as to what should be regarded as synonymous. This power of final 'definition' is not given to the executive officers."

In U. S. vs. George, 228 U. S. 14, the Court said:

"The justification urged for the regulation was that the word 'domestic' meant household. This Court rejected the contention and decided that the regulation transcended the power of the Secretary. We said: 'If Rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can an-

other. If he can abridge, he can enlarge. Such power is not regulation, it is legislation.' "

It is, therefore, respectfully submitted that there is nothing in the act of September 24, 1917, itself which makes it a criminal offense for any person not the owner thereof to deal in these War Savings Certificates and Stamps, and further, there is nothing in the act to authorize the Secretary of the Treasury to make regulations not purely of an administrative character that would render a disobedience of such rule an offense against the laws of the United States. As stated by District Judge Hough in the case of U. S. vs. Sacks, supra:

"The prohibtion against the transfer of stamps affixed or unaffixed, is far more than a procedural regulation. A stamp is a thing of value, bought and paid for, and to deprive it of the quality of assignability is a diminution of lawfully existing property rights for which, in my judgment, congressional action alone will suffice. The department has endeavored to diminish such property rights and indeed to destroy utterly unless the right is exercised as per regulation. It does not seem to me that this is a method of carrying out the statute as written. It is additional and very drastic legislation.

(b) It is further contended that the indictment is bad for duplicity.

It will be noted that the indictment alleges in one count that the defendants conspired to commit crimes

made offenses by the laws of the United States as well as conspired to defraud the United States, being the two separate and distinct offenses condemned by Section 37 in the two sub-divisions thereof. In the case of United States vs. Dembowsky, 252 Fed. 894, District Judge Tuttle said:

"It is elementary that two separate offenses cannot be included in one count of an indictment."

The question here is whether Section 37 creates only one offense which may be committed in any one of several modes specified, or does it contemplate and create several and distinct offenses? If the latter, they cannot be joined in one count of an indictment, but must be set forth in different counts. A careful examination of this indictment will show that it does not charge one transaction as a single offense committed by the different acts. It will be noted that it charges the defendant in the language of the statute with having done all the things forbidden by Section 37, and then proceeds to allege how they were done.

In Jelke vs. United States, 255 Fed. 275, the Court, in discussing the cases which consider the sufficiency of indictments charging a violation of Section 37, said:

"The general conclusions deducible from these cases are: The conspiracy statute creates and defines an independent crime and an offense against the staute is committed when 'two or more persons conspire either (a) to commit any offense against the United States, or (b) to

defraud the United States in any manner or for any purpose."

It may be contended that as the indictment properly charges the commission of at least one offense that the other allegations may be treated as surplussage, and that if the count be open to the charge of duplicity, the objection has been obviated by holding that the count properly charges one offense, and that the other allegations may be disregarded.

It cannot be said that the allegations "to defraud the United States" was surplusage. If sufficient facts are alleged to show a conspiracy to defraud the Untied States and the indictment does set out facts from which it would appear that the scheme in question was to defraud the United States, under such circumstance the case comes squarely within the rule laid down in the case of United States vs. Patty, 2 Fed. 664, where it is held that where two distinct offenses are each set out in adequate terms, an indictment is bad for duplicity, and neither allegation can be rejected as surplusage. In discussing the question of rejecting certain allegations as surplusage, the Court said:

"The difficulty with the position thus urged is that if the objection to this count can thus be obviated, I do not see why in every case where an indictment is bad for duplicity, the defect may not be avoided by the selection of one of the offenses charged, and then holding the other allegations charging distinct offenses to be merely superfluous. I do not think the difficulty can be thus

avoided. The true distinction between matters which make an indictment bad for duplicity, and that which may be treated as mere surplussage, is stated by Mr. Bishop in his first volume of Criminal Procedure, 'If an indictment describes one offense and then adds such words only as are in part sufficient to describe another, it is not, therefore, double. To be so it must set out each of the two offenses in adequate terms.' Therefore, as this count does not merely describe one offense and by inadequate allegations state in part another, so that the latter allegation may be treated as surplussage, but it does charge, in adequate terms, distinct offenses, it is, therefore, bad for duplicity."

It would also seem that the conspiracy indictment was further duplicitous in charging in one count a conspiracy to commit several distinct crimes for which different penalties are provided. In the case of John Gund Brewing Co. vs. United States, 204 Fed. 17, the indictment charged in one count a conspiracy to evade the payment of the internal revenue tax, and also a conspiracy to violate Section 239 of the Code, prohibiting C. O. D. shipments of liquor, the Court held that this indictment was duplicitous, as charging in the same count two distinct offenses for which different penalties are provided. In its opinion the Court said:

"These are two distinct offenses with different penalties for violations thereof. This has never been permitted."

This decision is quoted with approval in the case of Ammerman vs. United States, 216 Fed. 326.

II

RECORD FAILS TO SHOW ANY ISSUE JOINED BY DEFENDANT.

It is also alleged as a ground for motion in arrest of judgment and for new trial that the defendant was never called upon to plead to the indictment, and that the record fails to show the entry of any such plea made by or in his behalf.

The Bill of Exceptions plainly certifies the facts to be:

"That upon the arraignment of the defendant in this case on the 20th day of July, 1920, the said defendant, Angelo H. Rossi, demurred to the indictment herein, which said demurrer being overruled, the cause thereafter and on the 26th day of October, 1920, came on to trial without any plea to the said indictment having been made or entered by the defendant herein." (Trans., p. 70.)

In the face of this record, affirmatively establishing the omission of an essential element to due process of law, we submit that the verdict of the jury, not being based upon any issue before it, is meaningless and void.

Section 1698, United States Comp. Statutes (Section 1032, R. S.), provides as follows:

"When any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or

answer thereto, it shall be the duty of the Court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury."

This statute proceeds upon the principle that before a trial can be legally begun, there must be an issue to try, and that a plea by or for the accused is essential to the formation of the issue. Wherever the duty to arraign is imperative as rendered so by this statute, failure in the full performance of this duty is fatal when the record shows the failure in an Appellate Court. (Wharton Criminal Procedure, Section 1635.)

In Crain vs. United States, 162 U. S. 625, the Court reversed a judgment of conviction had for violation of a federal offense on the ground that the record failed to show that the defendant had pleaded to the indictment. Mr. Justice Harlan, in writing the opinion, declared that the record at the trial for a felony must affirmatively show that it was demanded of the accused to plead, and failure to show this is not a matter of form only which is cured by Section 1025 R. S., but is a matter of substance in the administartion of the criminal law involving the substantial rights of the accused. Excerpts from his opinion follow:

"Until the accused pleads to the indictment and thereby indicates the issue submitted by him for trial,

there is nothing for the jury to try; and the fact that the defendant did so plead should not be left to be infererd from a general recital in some order that the jury were sworn to 'try the issue joined.' The record should be a permanent memorial of what was the issue tried, and show whether the judgment whereby it was proposed to take the life of the accused or to deprive him of his liberty, was in accordance with the law of the land. * * *

"The views we have expressed would seem to be the necessary result of U. S. Rev. Stat., Section 1032 * *

"This statute is based on the act of Aril 30, 1790, Section 30 (1 Stat. at L. 119), the act of March 3, 1825, Section 14 (4 Stat. at L. 118), and the act of March 3, 1835, Section 4 (4 Stat. at L. 777). It proceeds upon the established principle that before a criminal trial can be legally commenced there must be an issue to try, and that a plea by or for the accused is essential to the formation of the issue. And the section above quoted requires the entry of the plea before the trial commences * *

"Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities upon this subject, safety lies in adhering to established modes of procedure devised for the security of life and liberty. Nor ought the courts in their abhorrence of crime, nor because of their anxiety to enforce the law against criminals, to countenance the careless manner in which the records of cases involving the life or liberty of an accused are often prepared. * *

"The present defendant may be guilty, and may deserve the full punishment imposed upon him by the sentence of a trial court. But it were better that he should escape altogether than that the Court should sustain a

judgment of conviction of an infamous crime where the record does not clearly show that there was a valid trial."

In Shelp vs. United States, 81 Fed. 700, arising in this circuit, the Court reversed a judgment of conviction for similar reasons. In its opinion, the Court said:

"It does not affirmatively show that Archie Shelp, the other defendant, was ever formally arraigned, or that any plea was ever entered by him to the indictment. The record is silent upon that question. No objection was ever made in the Court below, either during the trial, or upon the motion in arrest of judgment, or upon the motion for a new trial, or in the bill of exceptions, nor is it assigned as error upon the appeal to this Court that defendant, Shelp, was put upon his trial without any plea being entered to the indictment. It is therefore claimed by the United States that the question ought to be considered as having been waived by the defendant. It is, however, admitted that this Court can, in a proper case, 'notice a plain error not assigned'; that a writ of error addresses itself to the record; and that, if the record itself discloses the ground upon which a reversal is sought, there is no necessity for a bill of exceptions. If the failure to plead is a mere matter of form, and not of substance, the judgment should not be reversed. Rev. St. U. S., Section 1025. The authorities, however, are to the effect that, while the arraignment may be waived, the plea is absolutely essential. In capital or other infamous crimes, an arraignment and plea has always been regarded as a matter of substance and must be affirmatively shown by the record. Until the defendant has pleaded to the indictment, there is no issue to be submitted to the jury, and the omission to plead is fatal to the judgment, even after verdict. This rule applies as well to cases of misdemeanor as to cases of felony * * *

"If the defendant stands mute and refuses to plead, the Court is authorized to enter his plea of not guilty. Rev. St. U. S., Section 1032. But a trial without the entry of any plea by or on behalf of the defendant is invalid."

Of like effect is the case of Beck vs. United States, 145 Fed. 625.

In States vs. Walton, 50 Oregon 142, judgment of conviction was reversed because the record failed to show that the defendant had pleaded to the indictment. In this case the defendant made no objection to the irregularity complained of until after the verdict, nor did it affirmatively appear that the entry of plea would have affected the result or that the defendant was in any manner prejudiced by the oversight. The Court, however, held:

"It is essential to a conviction for felony that such plea must be entered before proceeding to trial. The rule is settled in this state that this fact must affirmatively appear in the record of the trial."

In answer to the contention that the defendant by going to trial waived this requirement, the Court said:

"The public has an interest in his life and liberty and neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the determination of life or liberty cannot be dispensed with or affected by the consent of

the accused, much less the failure when on trial and in custody to object to unauthorized methods."

"The statute in this state by its terms has expressly declared the entry of a plea to be essential to its issue, and this language in this respect being clear and free from doubt, we must recognize its provisions so long as in force."

In Rose's U. S. Supreme Court Notes to the case of Crane vs. United States, supra, are to be found a number of subsequent decisions where the doctrine therein announced was followed and the following citations are submitted:

12 Ann. Cases 704.
Ann Cases, 1915 C. 1070.
13 L. R. A., N. S. 811.
27 L. R. A., N. S. 1181.
21 L. R. A., N. S. 820.

It appears in Rose's Notes, and it is so specifically expressed, that the Crain case was distinguished in the case of Garland vs. Wash, 232 U. S. 645.

In Garland vs. Wash., supra, it was held that the accused need not be required to plead to a second and amended information. It will be noted in that case that the conviction was had for a violation of a statute of the State of Washington; that the issue had been joined on the first information, which resulted in conviction and the awarding of a new trial, but that a second information was thereafter filed to which no plea was made.

It thus appears that somewhere in the proceeding a plea had in fact been entered. In the case at bar there had been no plea at any time. Furthermore, in the Garland case, the Washington statute apparently provided that the defendant had the right to and could waive the formality of pleading. In the case at bar the laws of the United States, to-wit, Section 1032, R. S., which controlled the trial of this case, requires and insists upon the entry of a plea. Surely it will not be contended that the Garland case goes so far as to hold that the formality of a plea, either made by or on behalf of a defendant, can be dispensed with entirely.

While it may be true that the Garland case has in a measure modified the original decision in the Crain case, the Garland case, however, does not mean in any sense of the word that a plea is not necessary. There is no way to join an issue between the accused and the sovereignty save and except by the entry of a plea. If the defendant stands mute the Court shall enter a plea for him, and that plea shall be not guilty. (Atwell's Fed. Crim. Law, page 64.) Here the record affirmatively certifies that the defendant neither entered a plea, not that the Court entered a plea for him. It must, therefore, follow that the verdict based upon such a record is invalid, and should have been set aside.

III

PREJUDICIAL REMARKS OF TRIAL JUDGE.

Assignment of error No. 31 is predicated upon certain alleged prejudicial remarks of the Court made during the examination of William Glover, a most important witness for the defendant. Mr. Glover testified that he was the U. S. Secret Service agent in charge of the Portland office during the month of March, 1920; that during an investigation made by his assistant, Joseph Walters as to the dealings of a broker by the name of Randolph in War Savings Stamps, Walters had run across the defendant, Rossi, and in return for Rossi's information, his assistant, Walters, had promised him full immunity; that Rossi, desiring like assurance from Walters' superior, called upon Mr. Glover and thereupon Mr. Glover likewise gave the word of the Secret Service that the promise of immunity would be kept; that upon being informed by Mr. Veatch, the Assistant U. S. Attorney, that he was going to use Mr. Byron, Special Agent of the Department of Justice, to make further investigation in the matter, the witness washed his hands of the case. Subsequently and before this case came on for trial, he resigned from the service. He attended the trial under subpoena from the Government and naturally expected to be called as a Government witness.

Attention is here directed to the fact that the stand taken by Rossi, and which will more fully appear under a more appropriate heading, was that under the solemn promise of responsible heads of the Secret Service Bureau that he would be granted full immunity, he had divulged certain information and had made damaging confession and admissions against himself, which he would not have done without such promise of immunity. The Government saw fit to replace the man who had promised him immunity, and in presenting its case in chief was permitted to introduce Rossi's admissions and confessions made in pursuance to this promise of immunity, which were plainly of an involuntary character, and should not have been admitted. The Government failed to call Mr. Glover to the stand. It was, therefore, incumbent upon the defendant to wait until the Government's case was closed before he could be afforded an opportunity of calling Mr. Glover, and proving by him to the satisfaction of the Court that such promise of immunity had been made, and thereby effecting a removal from the consideration by the jury of the damaging admissions made by Rossi in pursuance to such promise. In the meantime, while the Government's case was progressing, the daily newspapers published sensational accounts of the trial, containing serious reflections upon the character and honesty of Mr. Glover, who had, prior to this case, been in the Secret Service for almost twenty years. Mr. Rossi's attorney had formerly been an As-

sistant U. S. Attorney for this district, and upon numerous occasions came in almost daily contact with Mr. Glover as a public official. Mr. Glover, who had been given no opportunity by the Government to explain his reasons for adopting and approving Mr. Walter's promise of immunity and who was naturally anxious to defend himself against the newspaper insinuations, sought Mr. Rossi's attorney for the privilege of taking the stand, which privilege was promptly given him, as his testimony was likewise desired by the defendant to establish the involuntary character of the admissions made by him. With this explanation there is submitted the following testimony given by him, under examination by defendant's counsel:

"Q. Did you come to me and ask me to put you on the stand?

A. I did, sir, night before last.

Q. Why did you ask that?

A. When I saw—the reason for asking you to put me on the stand—I saw that Mr. Veatch was not going to put me on the stand so I could explain away some of this newspaper notoriety that has been filtering here for the last six months; so I came to you and requested you to give me a chance to get the truth before this Court and my friends here.

Q. This was a personal request of me as a friend of yours?

A. Yes, absolutely."

Whereupon the Court interrupted as follows:

"COURT: Who is your friend?

A. Well, I have friends all over the coast, your Honor.

COURT: I thought you meant Rossi."

(Trans., p. 138.)

These remarks of the Court, in the light of all the circumstances in the case, were unwarranted. That they had a prejudicial effect must be readily apparent from the following newspaper account of same appearing in the Telegram:

"William Glover, former Secret Service operative in charge of the Portland office, was not called as a witness by the Government because he had been 'running around talking to attorneys for the defense,' according to his testimony as brought out by John Veatch, prosecuting attorney, in cross-examination of the Government's case against six Portland men charged with conspiracy in dealing in altered War Savings Stamps.

"Yesterday Glover testified he asked his friend, Barnett Goldstein, attorney for the defense, to put him on the stand in order that he might clear up recent newspaper notoriety before his friends.

" 'What friends do you refer to?' asked Judge Wolverton.

" 'Your Honor, I have many friends up and down the coast,' he replied.

" 'Oh, I thought you alluded to Rossi,' said the Judge."

(Trans., p. 62.)

The Court should not have made these remarks. Notwithstanding that the Court conceded that the defendant had established that such promise of immunity was in fact made; notwithstanding that the Court, after first permitting the introduction of the damaging admissions against Rossi to be placed in evidence, had subsequently withdrawn same from consideration by the jury, his remarks which were calculated to brand a witness as a friend and associate of an alleged criminal could not help but deprive the defendant of all the benefit he may have derived from Mr. Glover's testimony. It was clearly prejudicial.

At the outset, we admit that no exception was taken to the Court's remarks. As this Court can well understand, counsel is placed in a most embarrassing position when he deems a question improper, as he is loath to enter into discussion of its propriety with the Judge who has propounded it. Again, in view of the respect and deference entertained by the defendant's counsel for the trial Judge, counsel was extremely reluctant to give expression to any objection that might subject him to the charge of characterizing the Court as unfair. Counsel's failure to object, however, should not be permitted to work an injustice upon the accused.

While it may be true that as a general rule an Appellate Court will not consider an error not assigned, yet in doing justice, it is vested with discretion to con-

sider error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception. (Wiborg vs. U. S., 163 U. S. 32.)

In the case of Eskay vs. U. S., 261 Fed. 320, the Court said:

"The contention that proper objections were not made, and proper exceptions were not taken, to permit the consideration in this Court of the issues which have been discussed, has not escaped attention, but it fails to convince. And even if it were tenable, this is a trial for an alleged crime, it involves the liberty of the citizen, and the fault in the trial is so radical that it may well be noticed and corrected by this Court without objection, exception, or assignment."

In the case of McNutt vs. United States, 267 Federal, 670, it was held as follows:

"In criminal cases, where the life or liberty of the citizen is at stake, the courts of the United States in the exercise of a sound discretion, may notice and relieve from radical errors in the trial which appear to have been seriously prejudicial to the rights of the defendant, although the questions they present were not properly raised or preserved by objection, exception, request or assignment of error."

Moreover, the late amendment to Section 269, Judicial Code (act of March 3, 1911), as amended by the act of February 26, 1919, fully authorizes and even commends this Court to look to the entire record and render judgment without regard to the technical error or the

want of exception to the remarks of the Court. The amendment reads as follows:

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

Trial courts have been repeatedly admonished to abstain from making prejudicial remarks during the course of a trial. The defendant is entitled to the presumption of innocence by both judge and jury until his guilt is established. If the jury is led to believe that the judge does not regard that presumption it is clearly evident that the jury will not, no matter how emphatic the Court might be in instructing the jury to entertain the same. While considerable latitude is allowed trial judges, yet they should not be permitted to assume the functions of prosecuting attorneys. So far as the Court's examination of witnesses is concerned, it will be conceded that the Court is vested with some discretion in so doing with a view to speeding the progress of the trial, but that there should be as little intrenchment as possible upon the province and field of the jury. The right to a trial by jury is priceless and in this age of enlightenment a jury is naturally capable of finding the light without the aid of judicial observation which might lead the jury to think the way the Court leads, rather than

to incur the displeased mind of the Court. It is not that the jury fears punishment at the hands of the Court, but the jury looks up to the Court, and becomes, as it were, a worshiper at the shrine of the correctness of the judge's opinion, and in their newness to court atmosphere they tremble lest their judgment as to the credibility of a witness may be at fault, especially since the Court has clearly indicated what he thinks about it, and so the opinion of one man is substituted for the opinion that should be the product of twelve minds at work with all the guides that experience has given them.

Furthermore, the examination of witnesses is more the appropriate function of counsel than of the judge of the court, and in a jury trial where the parties are represented by able counsel, it is scarcely possible to conceive circumstances under which the Court is free to enter upon a lengthy or antagonistic examination of a witness, particularly when such examination partakes of a reflection upon the reliability and credibility of the witness, so as to prejudice the jury against its weight and value. It is altogether a task of great delicacy and much difficulty for the presiding judge to so conduct the examination of a witness as to prevent the jury from learning the trend of his mind, and therefore should only be undertaken when absolutely necessary. No such necessity existed here.

In the case of Adler vs. U. S., 182 Fed. 464, the Court said:

"The Circuit Court of Appeals is reluctant to interfere with the discretion of a trial judge in participating in the examination of a witness, but will do so when the judge's examination has been conducted in a manner so hostile to the defendant and his witnesses as to produce in the mind of the jury the impression that the judge has a fixed opinion that the defendant is guilty and should be convicted."

In the case of Sandals vs. U. S., 213 Fed. 576, the Court said:

"Positive and emphatic statements of a judge cannot be removed from the influence it has upon a jury by an instruction disclaiming any purpose to control the jury by the remarks complained of. The jury is naturally sensitive to the Court's expression of opinions concerning the issue of facts in the case."

In the case of Foster vs. U. S., 188 Fed. 385, the Court said:

"The judge should be very careful not to say anything calculated to exert a controlling influence upon the minds of the jury in ultimately determining the facts which are alone to be passed upon by them."

In Allan vs. U. S., 115 Fed. 3 (Ninth Circuit), the Court held that certain remarks of the District Attorney and the Court, reflecting as they did upon both the defendant and his attorney, were calculated to unduly

prejudice the jurors against the defendant and to prevent him from having a fair and impartial trial. The trial of every man should be free from undue prejudice or odium, especially upon the part of all officers clothed with the power and charged with the duty of administering the law, in such a manner as to reach the ends of justice and of right.

In the case of Hawkins vs. U. S., 116 Fed. 572, (Ninth Circuit), while questioning the jurors, the defendant's counsel asked one of the jurors as to whether he had any opinion as to the guilt or innocence of a joint defendant who had been tried and convicted for the same offense. The Court injected the remark: "That is one of the things that is an established fact in this community." The Circuit Court held that this was error, in that it had the effect of prejudicing this defendant's case in the minds of the jurors, a prejudice which was not removed or modified by any instruction subsequently given.

In the case of State vs. Donovan, 16 N. W. 206, the Court remarked in the presence of the jury, referring to the fact of defendant's drunken condition:

"If you offer it as a defense, I think it is immaterial because I shall instruct the jury that drunkenness is more of an aggravation than an excuse."

This was held to be error and not cured by subsequent instruction.

In the case of McNutt vs. U. S., 267 Fed. 670, the Court held:

"The action of a Court in reminding a witness for the prosecution, who made a statement favorable to defendant and not in agreement with a previous affidavit he had signed, of the penalty for perjury, on which the witness changed his testimony, in the presence of other witnesses and the jury, held so calculated to intimidate other witnesses and to prejudice the jury as to deprive defendant of the fair and impartial trial to which he was entitled."

In Kirk vs. Territory, 60 Pacific 797, the Court stated that it was error for the trial judge, during the trial of one accused of murder, to express in the presence of the jury an opinion as to the character or credit of the witnesses. This case quotes with approval the case of State vs. Clements, 15 Oregon 237, which held to like effect.

In the case of Rutherford vs. U. S., 258 Fed. 863, the Court held:

"We think that the attitude of the Court in regard to the testimony of these three witnesses and the action it took in the presence of the jury in the case of the witness, William F. Hudgings, was most prejudicial to the defendants. It was very likely to intimidate witnesses subsequently called, to prejudice the jurors against the defendants, and to make them think that the Court was satisfied of the defendants' guilt. What a judge may say to the contrary on such an occasion will not necessarily prevent such consequences. It is not enough to justify a conviction that the defendant be guilty. He

has a right to be tried in accordance with the rules of law. The defendants in this case did not have the temperate and impartial trial to which they were entitled, and for that reason the judgment is reversed."

As stated in the case of Briggs vs. People, 76 N. E. 502:

"Every lawyer appreciates the fact that any intimation, however slight or unconsciously made by the Court in the presence of a jury as to the force and effect of evidence, is most damaging to the party against whom it is made, and in a case of such grave importance to the defendant as this must be held reversible error. It is not the province of the Court, in a criminal case, to express any opinion upon the facts, either orally during the trial or in the form of instructions."

As stated in the case of O'Shea vs. People, 75 N. E. 984:

"Under unusual cicrumstances it may become his duty to call and examine witnesses himself, but where he does this he must not forget the function of the judge and assume that of the advocate. Necessarily, the extent to which the trial judge will participate in the examination of a witness is largely a matter of discretion with him, to be determined from the circumstances of the particular case as they arise; but in a jury trial, where the parties, as here, are represented by able, conscientious, and experienced attorneys, it is scarcely possible to conceive circumstances under which the Court is, in the performance of his duty, free to enter upon a lengthy cross-examination of witnesses. A suggestion to one or the other of the attorneys of the matter or line of inquiry which the judge desires developed is ordinarily all that is necessary."

As stated in the case of Andrea vs. Ketcham, 77 Ill. 379, and cited with approval in the case of Marzen vs. People, 50 N. E. 254:

"We are aware of no rule of law or practice that would allow the presiding judge to give to the jury his opinion on a controverted question of fact. The knowledge of the judge on the question at issue may have been superior to that of any witness sworn, yet the law would not permit him to bias the jury by his own opinion as to any fact in the controversy, which had to be established by evidence. * * * The opinion of the judge, given as it was before the jury upon a question of fact which was controverted, could not do otherwise than prejudice the jury against appellants."

As stated in the case of Kennedy vs. People, 44 Ill. 283, and cited with approval in the case of Marzen vs. People, 50 N. E. 254:

"The trial court excluded certain evidence, and, after reciting it, remarked, in the presence of the jury, 'that it amounted to nothing.' The Court in this assumed the province of the jury in determining the weight of the evidence. It was for the jury, and not for the Court, to say whether these statements, if made, amounted to anything, and such remarks made by the Court in the hearing of the jury are well calculated to exclude from their consideration such evidence."

It is needless to submit further citations, that under our system of jury trials, the influence of a trial judge with a jury is necessarily and properly of great weight, and his lightest word or intimation is received with deference and may prove controlling, particularly when it

effects the credibility and weight of a most important witness for the defendant. This was a matter solely within the province of a jury and should not have been invaded by the Court.

The remarks of the Court that the Secret Service man, Glover, was Rossi's friend gave the impression that they were both in collusion and naturally had a tendency to discredit Glover's testimony upon the important question as to the voluntary character of Rossi's admission. The weight and credibility of Glover's testimony was a question of fact to be determined by the jury from all the circumstances in the case. Whatever belief was to be entertained upon this subject was a belief to be entertained by the jury. When the Court made the statement attributed to him, having the tendency that it did to discredit Glover's testimony, he thereby unduly influenced the jury in the matter of determining an important question of fact, which was within the exclusive jurisdiction of the jury alone.

IV

PREJUDICIAL NEWSPAPER ACCOUNTS RENDERING FAIR TRIAL IMPOSSIBLE.

Assignment 30 is predicated upon the prejudice aroused against this defendant by articles appearing in the newspapers during the course of the trial.

While it is true that as a general rule this error will

not be considered where there is no proof that the jury was in fact actually unduly influenced by the newspaper articles, yet they are of such a nature as to make it apparent that no other result could have been possible. The defendant was entitled to a fair and impartial trial. We submit the following newspaper extracts to show that he could not have possibly had such a trial:

(a)

"Implication of the United States Secret Service in the illegal sale of War Savings Stamps obtained by the robbery of a number of country banks is expected when the trial of six men charged with altering and disposing of the stamps begins in Federal Court Wednesday.

"The stamps, together with some Liberty Bonds, were stolen from banks in Oregon and Washington last winter. The total value of the loot was in the neighborhood of $35,000." (Trans., p. 57.)

NOTE: The only charge in the indictment of any theft of stamps is that in one of the overt acts it is claimed that one of the defendants, Peterson, stole a quantity of War Savings Stamps from the Scio bank. No other defendant is implicated in the theft and no other bank is alleged in the indictment to have been robbed. Furthermore, at the very outset of the trial insinuations are directed against Mr. Glover, U. S. Secret Service agent, a witness for the defendant, which tended to prejudice the jury against his credibility.

(b)

"The six defendants are Bob La Salle, ex-detective on the city police force; Fred Peterson, *alleged robber,* who *has served three terms* in penitentiaries; Dave Stein, local pawnbroker; William Brenner, owner of a clothing store; Angelo H. Rossi, pawnbroker and alleged to be a fence for thieves, and W. E. Smith, a watchmaker, who once worked for Rossi." (Trans., p. 59.)

NOTE: Before there was the slightest proof submitted to the jury that any of the defendants had previously been convicted of a crime, the jury was told through the medium of the press that the defendant, Peterson, had served three term in penitentiaries. Reprehensible as this statement was, appearing when it did, attention is called to the fact that the only proof offered at the trial of any previous record on the part of the defendant, Peterson, was the fact that he was then serving a term upon his plea of guilty to the possession of the same altered stamps which was made the basis of this conspiracy indictment.

(c)

"During the progress of the trial Thursday, William Glover, former head of the U. S. Secret Service here, held frequent whispered conferences with Barnett Goldstein, one of the six attorneys for the defendants.

"It was charged by Assistant U. S. Attorney Veatch that Goldstein is secretly representing Glover in this trial, it being intimated by Veatch that Glover himself

may be on trial at some time in the future." (Trans, p. 61.)

NOTE: The insinuation that Mr. Glover might be put on trial for some alleged offense (an offense conjured up to prejudice the defense) could not help but prejudice the jury against him, thus depriving the defendant of the full value of his testimony.

(d)

"New developments growing out of the War Savings Stamp scandal in the Federal Court trial now in progress today here were:

"That $5000 worth of stamps disappeared after they had passed through the hands of three detectives who made an arrest of a petty criminal in whose possession was found stamps to the value of something like $20,000, part of the loot from the Bank of Asotin, Wash., robbed by yeggs.

"That an attempt was made to bribe City Detective Tom Coleman.

"That the total amount involved in the robbery of six or seven small country banks in the Northwest within a space of a few months was close to $200,000.

"That the recent robbery of the Scottsburg post-office and general store was the work of a yegg gang, headed by Frank Wagner, notorious safe cracker, is the opinion of Pinkerton operatives who have been working on the case.

"Wagner, who was serving a forty-year sentence at Salem for the blowing of a safe at Astoria, made his escape a few weeks ago.

FENCES WERE TO SELL PLUNDER.

"The theory that Wagner planned and carried through the coup of Scottsburg, where $20,000 in cash was the principal loot, was formulated when the Pinkerton man learned that Ann Bryant, 'affinity' of Wagner, has been making her home within six miles of Scottsburg during the past few months.

"All of this plunder is supposed to have been brought by the bank robber gang to Portland to be disposed of through a Portland 'fence.'

"Angelo Rossi, one of the six defendants in the War Savings Stamps controversy case now being prosecuted in the Federal Court, is suspected of having been the principal distributing agent, and W. E. Smith, William Brenner, David Stein and Detective Bob La Salle, co-defendants with Rossi, are presumed to have been sub-agents. Besides these, the United States Department of Justice believes that many other Portland men are involved.

" 'The worst gang of yeggs that has ever operated on the Pacific coast,' said Special Agent William Byron, of the U. S. Department of Justice, 'are mixed up in this conspiracy.'

FIND BRIBE ON HIS FRONT PORCH.

"That it would have been impossible for bank robbers to put $20,000 worth of Government securities on the market without the co-operation of Government sleuths and of some local law enforcement agencies is the opinion of Bryon." (Trans., p. 63.)

NOTE: This account of other alleged robberies of stamps, having no connection with the stamps covered

by this indictment, was palpably prejudicial to the defendants, particularly in view of the fact that no such proof as indicated in this newspaper account was even attempted to be submitted at this trial. We also call attention to the alleged remarks of Mr. Bryon, a Government witness. It would seem that the Government was trying to win its case with the aid of newspapers rather than by the orderly submission of proof in a court room.

A somewhat similar situation arose in the case of Harrison vs. U. S., 200 Fed. 669, wherein the Court, holding that the defendant did not have a fair trial and was, therefore, entitled to a new trial, said:

"We should not omit to mention one occurrence upon the trial. At the time of, and shortly preceding, the arrest, the postoffice inspectors learned that the refunds were not being promptly made as hereafter stated. In February, 1911, while the trial below was in progress, the Postoffice Department promulgated a 'fraud order' against Harrison in connection with the vacuum cleaners, and this fact was prominently published in the Cincinnati newspapers, and so presumably came to the jury's attention. The record indicates no reason to presume that the withholding of this order until after the jury was selected and the trial in progress, and its promulgation and publication in such a way as to have the most prejudicial effect upon the respondent before the jury, amounted to anything more than an unfortunate coincidence, and the occurrence was beyond the control of the trial judge; but it was of itself sufficient to make impossible that fair trial to which every respondent is entitled."

In Cooper vs. People, 22 Pacific 799 (6 L. R. A., 429), the Court said:

"The parties have a constitutional right to have their cases tried fairly in court by an impartial tribunal, uninfluenced by newspaper dictations or public clamor."

It follows, therefore, that any newspaper comment which tends to make the position of the litigant difficult before a court or jury, hampers the efforts of such court or jury to adjudicate the issue fairly and dispassionately.

In United States vs. Toledo Newspaper Company, 220 Fed. 501, the Court said:

"Newspaper criticism of a party to a pending cause respecting the same has always been considered as misbehavior tending to obstruct the administration of justice. This upon the principle that the Court has a paramount duty to protect suitors from anything which will interfere with a fair consideration of their trial. It was this, doubtless, which prompted Chancellor Kent to say, 'It is unreasonable to leave a suitor unprotected in the moment when he stands most in need."

Answering the contention that it was not proven that articles had been read by the jurors or that they had been in fact influenced thereby, the case of State vs. Howell, reported in 13 Annotated Cases, 503, is decisive of the question. In this opinion the Court said:

"But articles circulated through the neighborhood when a trial is in progress may influence the trial with-

out being read by the Court or jurors. Witnesses may be intimidated or otherwise influenced by them. A sentiment favorable or unfavorable to one of the parties to the case may be made to so pervade the community as to reach the court room and the triers and interfere with the fair and impartial performance by the latter of their duties."

The mere reading of the newspaper articles above quoted should be sufficient to impress this Court that the sentiment aroused by the press through the publication of matter not established at the trial nor even connected with the charge in the indictment, was most unfavorable and prejudicial to the defendants and could not but help prevent them from having that fair and impartial trial which the constitution guarantees to every person.

V

IMPROPER EVIDENCE AS TO REGISTRATION OF STAMPS.

Assignment 20 is predicated upon the allowance by the Court in evidence of the testimony of Miss Daisy Buckner relating to the registration of War Savings Stamps. Miss Buckner, postmistress of the Scio post-office, was permitted by the Court, over the objection of counsel, to testify that the War Savings Stamps in question were registered and was then permitted to relate the method followed by the department in registering the stamps. (Trans., p. 71.)

Later, during the course of her examination, the Government was permitted, over the objection of counsel, to introduce in evidence a list of claims filed with the department by a large number of the Scio postoffice patrons for the redemption of the stamps so registered, and which had been stolen from the Scio State Bank, where said patrons had placed them. (Trans., p. 77.)

This evidence was immaterial on the ground that nowhere in the indictment was it alleged that the conspiracy contemplated the alteration of registered stamps, and the admission of this testimony was, therefore, a fatal variance between the charge made and the proof submitted, and for the further reason that this testimony was prejudicial to the defendant because of the fact that non-registered stamps are not entitled to replacement and redemption by the Government, whereas registered stamps are. The Court can readily see the importance of this line of testimony. In the indictment the Government merely claimed that the defendants violated the counterfeiting statutes by altering certain obligations of the United States, which in this instance were War Savings Stamps. No charge is made that the stamps were registered or that the conspiracy ever contemplated the alteration of registered stamps. The testimony should, therefore, have been restricted to the matter of the alteration of non-registered stamps and none other. It may be true that the alteration of registered stamps would

involve a fraud upon the Government, and in fact such would be the logical and reasonable consequence, but this is not within the scope of the indictment. By the allowance of this testimony, to which objection was taken, the jury was permitted to go outside the limits of the indictment and pass upon the question of the alteration of registered stamps, when no such issue was made by the pleading. We, therefore, contend that this was a fatal variance. The defendant came prepared to defend himself against the charge of conspiring to alter non-registered stamps. He had a right to believe that no other charge of conspiracy would be brought against him. In that he was misled to his prejudice, for the proof offered by the Government that the stamps were registered in no wise corresponded with any allegation in the indictment. We contend that the crime must be proved as laid in the indictment. The Government, had it intended to prove that the stamps were registered, could have easily charged a conspiracy to alter registered stamps, but it did not do so, and it should not, therefore, have introduced any proof appertaining to the registration of stamps, as that was not within the scope of the indictment. As stated in 12 C. J. 636:

"As in other criminal prosecutions, on trial of an indictment for conspiracy the proof must correspond with and support such material averments, and if the offense intended is stated with unnecessary particularity, it should be proved as laid. The purpose and object of the

conspiracy must be proved as laid in the indictment. Likewise the means to be employed in effecting the object of the conspiracy must be proved as charged."

In the case of Rabens vs. U. S., 146 Fed. 879, the accused was indicted for conspiracy to rob the postoffice at Latta, S. C. Evidence was introduced tending to show a general conspiracy to rob. The Court, in reversing the judgment of conviction, held that this was a fatal variance. In its opinion the Court said:

"The count upon which the plaintiff in error was indicted is clear and specific, and leaves no doubt as to the offense charged, to-wit, a conspiracy to rob the postoffice at Latta. There is no allegation in the count which can in any way be construed to mean a general conspiracy to rob. The District Attorney could undoubtedly have charged a general conspiracy to rob. However, he did not see fit to do so, but elected to rely upon the specific charge of a conspiracy to rob the postoffice at Latta. Therefore evidence tending to show a general conspiracy was incompetent and should have been rejected by the Court. The Government having relied upon a count charging a conspiracy which is restricted to one transaction, it was incumbent that it should satisfy the jury beyond a reasonable doubt that the plaintiff in error entered into a conspiracy with intent to rob the postoffice at Latta, as alleged."

As stated in Wharton's Criminal Evidence, Vol. 1, page 277:

"As a general rule the means, or the manner of accomplishing the cirminal intent and purpose, are matters of evidence for the jury, and not necessary to be set forth

in the indictment. Where, however, it is necessary, or where the pleader elects to set forth by averments, in the indictment or information, a description of the instrument or the means by which the offense was consummated, then the evidence must correspond with the averments in general character and operation."

In the case of Ward vs. State, 21 S. W. 250, the Court held:

"On the trial for conspiracy to commit robbery if the indictment alleges the possession of the property intended to have been stolen in one person, and the title in another the state must prove both allegations.

"If Lyon had possession and exclusive control of the property of the Pacific Express Company, it was not necessary to allege that the property belonged to the company. It would have been sufficient to have alleged the property in Lyon. But as the indictment gave a particular description of the crime, though unnecessary, the state must be confined to the allegations and prove the offense as described."

As stated in the case of Commonwealth vs. Ellis, 118 S. W. 976:

"The evidence must be limited to establishing the charge made in the indictment. It can take no wider range than the indictment warrants. If the commonwealth chose to limit the range of the charge against the defendant to the conspiracy to intimidate Mose Thornton, the defendant had a right to believe, and to rely upon that belief, that he would be required to meet only this charge, and to rebut evidence of the commonwealth against him tending to establish this charge."

Furthermore, the introduction of this testimony could not help but befog the simple issue as made out by the indictment, for the evidence tended to raise an additional issue upon an offense not included in the indictment. As stated in the case of Ford vs. U. S., 259 Fed. 552:

"In the prosecution for an unlawful introduction of liquor into a state, evidence tending to show that the defendant was also concerned in another attempted introduction of liquor on the same night is inadmissible. The danger of this kind of evidence is that it is likely to lead the jury aside from the case on trial, confuse the issues and result in a conviction for acts not included in the indictment."

VI

IMPROPER EVIDENCE AS TO DEFENDANT'S ADMISSIONS BEFORE GRAND JURY.

Assignment 6 is predicated upon the allowance by the Court in evidence of the testimony given by Mr. P. A. Young, the foreman of the grand jury that returned this indictment, of statements made to it by the defendant. It is the contention of the defendant that these statements were induced by a promise of immunity heretofore extended to him, and upon which promise he relied.

According to the bill of exceptions it appears that Joseph Walters, a Secret Service agent, acting under instructions from his superior officer, Mr. Glover, made an investigation in the month of March, 1920, relative

to certain War Savings Stamps that had been reported to him as being circulated about the city. (Trans., p. 127.) On March 17, 1920, he promised immunity to the defendant in return for certain aid and information to be furnished by the defendant; that he received such information and that he was enabled by reason thereof to locate the man that robbed the Scio bank and who handled the stamps; that he thereupon informed Mr. Glover of such promise, who in turn was called as a witness and who corroborated Mr. Walters' testimony as well as testifying that he personally confirmed and ratified the promise of immunity; that at the commissioner's hearing of Peterson, the man alleged to have robbed the Scio bank, he shielded his informant, Rossi, by not divulging the source of his information. This was done with the sanction and consent of the Assistant U. S. District Attorney, Mr. Veatch, who conducted the case before the commissioner; that after he had received valuable information from Rossi concerning the disposition of these stamps, Mr. Veatch took the case out of his hands and further investigation in the matter was conducted by Mr. Bryon, special agent of the Department of Justice; that then Mr. Glover withdrew from the case entirely; that until that time, to-wit, between March 17, 1920, when the promise of immunity was made to Rossi, up until May 13, 1920, when he was replaced by Mr. Bryon, Mr. Glover was receiving information from the defendant.

Mr. Veatch, the Assistant U. S. Attorney, admitted that this case was brought into his office by Mr. Walters, and that in May, 1920, when Mr. Rossi was taken to Bryon's office, he knew that in March, 1920, Rossi had given certain information to Walters in return for which Walters had promised him immunity. (Trans., p. 126.)

Mr. Bryon testified that about May 13, 1920, he had an interview with the defendant, Rossi, in his office at which interview Mr. Veatch was present. That at that time Mr. Rossi informed him that he had been promised immunity by Mr. Glover (trans., pp. 93-95); that thereupon Mr. Rossi gave him a detailed statement of the transactions in which he was involved, which statements were thereafter transcribed and testified to by Miss Doeltz. (Trans., p. 95.)

At this point attention is called to the fact that strenuous objection was made to the introduction in evidence of the testimony given by Mr. Bryon, and to that of the transcript read by Miss Doeltz of Mr. Rossi's statement to Mr. Bryon on May 13, 1920, upon the ground that such admissions were made and induced by the promise of immunity. At that time the Court overruled the objection and allowed the testimony to go in.

After the Court had thus ruled, the Government called Mr. Young, the foreman of the grand jury. He testified, over the objection of the defendant, that while

the grand jury was investigating the case in the month of May, 1920, Mr. Rossi appeared before that body and gave testimony concerning his connection with the stamps which was the subject matter of their inquiry; that at the time he gave this testimony, the grand jurors were told that partial information had been given by Mr. Rossi in return for which he had been promised immunity from prosecution. (Trans., p. 117.)

At the close of the Government's case the defendant called Messrs. Walters, Glover and Veatch, who positively testified that such promise of immunity had been extended to Mr. Rossi, whereupon the defendant renewed his objection to the testimony of Mr. Bryon as well as that of Mr. Young, and moved that they be stricken out. The following excerpts from the bill of exceptions will indicate the nature of the objection and the Court's ruling at that time:

"MR. GOLDSTEIN: At this time, if the Court please, in view of the testimony of Mr. Walters and of Mr. Glover, who, the testimony indicates, were then agents in charge of the Secret Service branch of the Government, and who were then and there acting and qualified to act as such, that they had secured certain information from Mr. Rossi upon certain inducements held out to him of hope of being shielded and protected from prosecution concerning his connection with the stamps, I move that any statements or admissions introduced in evidence, subsequent to that promise and subsequent to securing information through him, based upon that hope, be stricken out, on the ground that it is involuntary, and

on the ground it was induced by hope on the part of Mr. Rossi, and not a voluntary statement made by him without the holding out of such hope.

"COURT: This is an indictment upon a charge of conspiracy, and even if Rossi had given this information under inducement, yet the information would be pertinent for determining whether or not he and the other parties—alleged parties to this conspiracy, were really and actually engaged in the conspiracy. So that, take it any way you like, the testimony of the admissions of Rossi would be pertinent in this case. As to how it would affect Rossi himself, the Court will instruct the jury about that. I will overrule the motion.

"Exception allowed." (Trans., p. 139.)

At the close of all the evidence in the case the defendant again renewed his objection to this testimony, at which time the Court changed his mind and decided that the testimony of Messrs. Bryon and Young should be stricken out upon the ground that a promise of immunity had been made to Rossi, and that he had a right to rely upon such promise. His opinion thereon is here submitted:

"COURT: I have an idea he had a right to rely upon that promise, and very likely did rely upon that promise for immunity when he was called before Mr. Bryon and there caused to make a statement. The warning extended to him, of course, was proper and right, but I doubt whether that warning will deprive him of his right to depend upon the immunity that was offered him by a detective officer. There was some testimony, there was some information given by this defendant, Rossi, which led to the arrest of Peterson; and

so far as he is concerned, according to the understanding as testified to by Mr. Glover and by Walters, Rossi did give some information which led to the detection and the arrest of Peterson with these stamps on his person or in his room; so that Rossi, having carried out what Glover said was his part of the agreement, and having rendered that service which led to the arrest of the defendant Peterson, he has performed his part of the agreement, and Walters having extended him immunity, I think he is entitled to be relieved from the effect as against him of that testimony.

"MR. VEATCH: That is only as to his admissions before Mr. Bryon.

"COURT: Yes.

"MR. VEATCH: How about the admissions before the grand jury?

"COURT: I think that must go the same road." (Trans. p. 142.)

Later, the Court again changed his mind and permitted the testimony of Mr. Young concerning the admissions made by Rossi before the grand jury to stand. (Trans. p. 146.) In that, we contend the court erred. It is difficult to conceive how the court can exclude Bryon's testimony without likewise excluding Young's testimony. They were both based upon admissions made by Rossi about the same time, to-wit, May 13, 1920, and subsequent to the promise of immunity that had been extended Rossi upon which he relied, and had a right to rely. Nothing transpired between those dates

to warrant a belief on the part of Rossi that such promise had been revoked. Why then could he not rely upon that same promise when he made his statement to the grand jury? The court apparently was under the impression that he was justified in such reliance when repeating his admissions to Bryon. It would seem that the defendant would be considerably more justified in repeating his admissions to the grand jury based upon such reliance, particularly when upon such testimony the grand jury was enabled to return an indictment against those he had given the information desired by the Government, and for which information he had in the first place been promised immunity.

In the case of Bran vs. U. S., 168 U. S. 532, the Supreme Court said:

"Where there is any doubt as to whether the confession was voluntary or not must be determined in favor of the accused. Where the language of the officer is such as to hold out an inducement, no confession or statement made in consequence thereof can be admitted. Any inducement offered by one in authority calculated to operate upon the mind of the prisoner, would render a confession as a consequence thereof inadmissible. The character of the alleged confession depends upon the question whether the making of same was voluntary and without inducement or compulsion, and not whether the particular communications contained in it were voluntary or not."

That there was some doubt as to the voluntary character of the admissions made by defendant before the

grand jury is apparent by the frequent changes of mind manifested by the court, but in our opinion there should have been no doubt, for the simple reason that there was nothing in Mr. Young's testimony from which the court could even infer that Mr. Rossi had been explicitly warned, as he should have been, if he was not to rely and could not rely upon the promise of immunity previously extended to him so far as his admissions to the grand jury were concerned.

In 16 C. J. 722 it is stated:

"Where a confession has been obtained under circumstances rendering it involuntary and inadmissible, a presumption exists that any subsequent confession arose from a continuance of the prior influence, and this presumption must be overcome before the subsequent confession can be received in evidence. The controlling influence which produced the prior confession is presumed to continue until its cessation is affirmatively shown, and evidence to overcome or to rebut this presumption must be very clear, strong, and satisfactory; if there is any doubt on this point, the confession must be excluded."

As stated in State vs. Wintzingerode, 9 Ore. 153:

"The circuit court had the undoubted right to try the question whether the original influence had ceased when the subsequent confessions were made, and if the record before us disclosed any fact or circumstance to justify the belief that they had in fact ceased, when such subsequent confessions were made, we should not disturb its determination. But no such facts or circumstances appearing by the bill of exceptions, which

purports to give all the testimony in substance, the subsequent confession of Cameron being on the same or at farthest the day succeeding the original confession to Officer Mead; the prisoner being still in custody on the same charge; the inducement to make the original confession being still in full force and not withdrawn, and no warning having been given, we cannot escape the clear and firm conviction that the same influences which induced the original confession to Officer Mead, and which the circuit court, with better facilities for arriving at a correct conclusion than this court possesses, held inadmissible, because it was so induced, were in full operation upon the appellant's mind when subsequent confessions were made, and that therefore these confessions should have been excluded on the trial, and not allowed to be given in evidence against him."

In the case of U. S. vs. Charles, Fed. case 14786, the defendant was indicted for arson. He made an involuntary confession before the committing magistrate. Thereupon the prosecutor called one of the grand jurors to testify as to what the defendant had subsequently stated before the grand jury. The Appellate Court granted a new trial upon the ground that:

"The first confession of the prisoner was made under the impression of fear and hope excited by the observations of the magistrate, therefore no subsequent confession of the same facts ought to be given against him."

While it is true the influence of an improper inducement may be removed by a subsequent confession if the accused is properly cautioned, the warning given should be explicit and it ought to be full enough to apprise the accused that anything he may say after such warning

may be used against him and that a previous confession made under improper inducement cannot be used against him, for it has been well said:

"For want of this information, the accused might think that he could not make his case worse than he had already made it and under this impression might have signed the confession."

Wharton on Criminal Evidence, p. 1393.

In the case of United States vs. Cooper, Federal Case 14864, the Court said:

"A person having been once induced by improper influence to make a confession, any other confessions of a like character although made at a subsequent time and to different persons are inadmissible even when voluntarily made unless it be shown that the prior improper influence has been removed either by an explicit and distinct warning or some other equally cogent means."

As to the inadmissibility of confessions induced by hope, attention is called to the exhaustive opinions in the cases of

Bram vs. U. S., 168 U. S. 532.

Sorenson vs. U. S., 143 Fed. 820.

It is stated in Zoline's Federal Criminal Law and Procedure, Section 326:

"It is well settled that confessions not voluntarily made are inadmissible against an accused, and the courts are astute, and properly so, in protecting the rights of accused persons against confessions obtained by duress

or through hope or fear. To entitle the Government to introduce in evidence the statement or confession of the accused, whether oral or written, it must appear that it was made voluntarily and without compulsion or inducement of any sort. Confessions of a defendant are inadmissible if made under any threat, promise or encouragement of any hope or favor. The burden of proof that no improper inducements or threats were made when the confession was made is with the prosecution."

In Grynor vs. State, 49 S. E. 700, the Court said:

"If a confession is induced by another through hope of benefit, it is involuntary although such inducement be held out by one person and the confession be subsequently made to another who has no knowledge of such inducement and who offers none himself."

In the case of U. S. vs. Chapman, Federal Case 14783, it was held that a confession made by a prisoner on the hearing before a committing magistrate, although previously cautioned by the magistrate not to incriminate himself, was inadmissible because it appeared that 42 hours previous he had made a confession before one of the magistrate's officers under the influence of false promises.

In this case it was contended by defendant's counsel:

"If inducements have been held out, and confessions obtained within a reasonable time before the official examination, the attention of the prisoner must be called to his prior confession and then explicit warning must be given not to rely on any expected favor. The loose and general caution 'not to incriminate himself' is far

from sufficient. Inducements being once held out and confessions procured, the burden of proof is on the prosecution to show that they have been entirely removed, and that perfect freedom prevails in the mind. The presumption of law is that the influence still remains until by clear and satisfactory proof it is shown that every vestige is removed and the mind again set free. The proof, whether positive or circumstantial, must be ample and satisfactory."

In its opinion, the Court said:

"Had the mayor been apprised of the previous confession, it would have been his duty to have told the prisoner, previous to his examination, in addition to the usual caution, that the promises made by the constable were delusive and unauthorized, and to make him clearly understand that anything he was about to confess, must not be with the hope or expectation of having the slightest favor shown to him in case of conviction. Without such information to the prisoner, may it not be a rational conclusion, that the confession which followed was made under the influence of the promises which had preceded and induced the previous confession? It is immaterial what length of time may have elapsed between the two confessions, if there had been no change in the circumstances or situation of the prisoner."

In Conley vs. State, 7 S. W. 255, the Court said:

"If the confession is clearly traceable to the prohibited influence, the trial judge should exclude it and his failure to do so is error." In its opinion the Court said:

"The court refused to permit anything which transpired in the grand jury room to go to the jury, but admitted the statement made to the three witnesses named. The confession made to those witnesses is, we

think, fairly traceable to the hope inspired by the assurances made by the grand jurors and prosecuting attorney. These officers, in their commendable zeal to ferret out the perpetrators of the crime, evidently led the prisoner to expect favor from his confession. It was the natural consequence of the course pursued that such an impression should rest upon his mind. It is true one of the witnesses testified that he was satisfied the prisoner understood all the while that he was to be indicted, but none of them testifies that a hope of leniency in the prosecution was not fairly deducible from what transpired in the jury room alone; and the foreman felt sure that no other conclusion could have been reached by the prisoner. If a doubt remained in the prisoner's mind after the first day's experience, it must have been dispelled by the assurance he then received from the state's attorney. What could he have inferred from that except that a further and fuller statement would be followed by leniency or an exemption from prosecution? The assurance that he would be dealt with fairly at the hands of the state cannot be interpreted as merely a guaranty that he should not thereafter be cheated of his legal rights. The integrity of the state's official, and the protection which the most wretched feels the courts will afford him, was sufficient guaranty of that favor. The prisoner must have taken this last assurance as a sanction of the hope he understood the grand jurors were holding out to him. By all the opinions, arousing an expectation of clemency by a prosecuting officer will exclude the confession. It is not material whether the prosecuting officer knew the grand jury had inspired a hope which his language would inflame, or that the grand jury were informed the officer would talk, or had done so, with the prisoner. The test is: Was there a casual connection between the hope aroused and the confession? The fact that the confession is not made to the officer or officers who generated the hope is immaterial.

When the improper influence has been exerted, it must be shown by the state that it has been removed before a subsequent confession is admissible."

The conduct of the prosecution in using the confession of Rossi under the circumstances here mentioned for the purpose of bringing about his conviction was unjustified and unwarranted. Here is the case of a man who placed implicit faith and confidence in the promise of a Government officer. That Government officer was a man in full authority of the investigation then being conducted. He promised immunity to Rossi in return for which he wanted certain information that Rossi had. Rossi had the right to rely upon such promise, and he did so, by reason of which he gave damaging evidence against himself and furnished information to the officers that helped them to discover the whereabouts of a considerable number of War Savings Stamps. His information directly led to the arrest of the defendant Peterson, at whose preliminary hearing the promise of immunity was kept so much so that protection from public exposure was accorded him with the knowledge and consent of Mr. Veatch, the prosecuting officer. That promise of immunity was made on March 17. The promise was continued to be respected and kept by the Government officials until May 13th, 1920, during all of which time Mr. Rossi continued to aid them in their investigations. Nothing had transpired during that time to lead Rossi to believe that the promise of im-

munity would be disregarded or revoked. Then on May 13th it develops there was some friction between two Government officers, Mr. Glover of the secret service and Mr. Bryon of the Department of Justice, with the result that Mr. Glover was removed from the investigation and Mr. Bryon substituted in his stead. Mr. Bryon calls Mr. Rossi to his office in the old Post Office building where the grand jurors were even then conducting their secret inquiry. Mr. Rossi responded. After assuring himself of Mr. Bryon's knowledge that the promise of immunity had been extended to him he repeated the same facts that he had previously told Mr. Glover and for which the promise had been made. There was not the slightest reason on his part to withhold any information, for he still had faith and trust in the promise of the Government, made through one of its responsible officers. The grand jury was then in session. It would be an insult to the common sense of this court for the prosecution to contend that Rossi begged and pleaded to go before the grand jury. What for? What had he to gain thereby? He had already received immunity from his disclosures to Glover and Bryon. It would merely mean a repetition of his statements to those officers. It stands to reason that when he did appear before the grand jury he did so at the "suggestion" of the prosecuting officer, who naturally desired his aid to place sufficient facts before the grand jury to bring about the present indictment against all the defendants named

therein. There was no reason for Mr. Rossi to manifest any reluctance about appearing before the grand jury. He appeared and repeated the same story that he had told Glover and Bryon, still relying upon the promise of immunity, and still having faith in the Government. If the prosecuting attorney intended to use his admissions against him he should have in all fairness and justice explicitly advised him that he could no longer rely upon the promise of immunity, and that if he offered to make any further statement it could be used against him. This the prosecuting attorney did not do. It might be appropriate at this time to call the learned prosecutor's attention to the following advice of District Judge Cushman to be found in the case of U. S. vs. Kallas, 272 Fed. 753:

"While it may be that many know of their rights, and, even when in prison, have the will and courage to stand upon them, there certainly are others who do not. The safer and better course to pursue is to require evidence that each and every prisoner has been advised of his right to remain silent, and warned of the danger in speaking, before any statement is admitted, rather than enter upon a more or less speculative inquiry as to whether the statements of accused were made voluntarily or not. In the nature of things, it often happens, not only upon the examination in the jail, but upon that in court regarding the circumstances of the inquiry at the jail, that there are many against one, the accused. Whether it arises from zeal or prejudice, born of their calling, the nature of the accusation or situation, or all of these and other things, it does not matter—consciously or unconsciously, upon such an inquisition, the police, and officers having

similar duties, often array themselves against the accused."

It comes with ill grace from the Government after having broken faith with Rossi by indicting him, which it did in spite of Mr. Glover's promise not to do so, to now insist, in addition, upon using his statements to the grand jury as evidence against him under the pretense that it was voluntarily made. It would be a travesty upon the very justice that the Government has thus far with just pride invoked and displayed in all their prosecutions. The prosecuting officials, zealous or otherwise, should not be permitted to play fast and loose with the high and lofty principles of fair play, no not even to bring about the conviction of an alleged dealer in War Savings Stamps.

In the case of Silverthorne Lumber Company vs. U. S., 251 U. S. 385, there had been an unlawful search by the prosecution of defendant's office, and papers seized. Copies were made by the prosecution, and the originals, on application of the defendant, ordered returned to them; but the court impounded the copies. The prosecution thereafter subpoenaed the defendant company to produce the originals, and, for their refusal to obey, the sentence of contempt was imposed. In that case the court says:

"The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by

that means which otherwise it would not have had. The proposition could not be presented more nakedly. It is that although, of course, its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge it gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. Weeks v. United States, 232 U. S. 383, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. 232 U. S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledged gained by the Government's own wrong cannot be used by it in the way proposed."

VII.

PREJUDICIAL TESTIMONY OF DEFENDANT'S ADMISSIONS TO MR. BRYON.

Assignments 3, 4, 5 and 12 are predicated upon the admissions made by the defendant to Mr. Bryon and transcribed by Miss Doeltz. At the time the Government introduced this evidence, defendant objected on the ground that it had been obtained by the promise of

immunity theretofore accorded to the defendant and was, therefore, involuntary. The court overruled the objection. Subsequently and at the close of the case the court ordered this testimony to be stricken out. It is the contention of the defendant that the prejudice already aroused by this damaging evidence was not and could not have been removed from the minds of the jury, and that, therefore, the court should have granted the defendant's motion to withdraw a juror or to grant a new trial. A bare reading of the alleged admissions made will suffice to indicate the highly prejudicial character of this testimony. The prosecution certainly knew that this testimony was of an involuntary character, and should never have imposed upon the court as it did by introducing evidence that was calculated and plainly intended to prejudice the jury against Rossi at the very outset of the trial.

As to the practice on the admission of this testimony, the rule is stated in Wharton on Criminal Evidence, 1294, in the following language:

"When it becomes necessary, in the course of a prosecution, to offer a certain class of evidence, and the proposing counsel knows that its admission will be disputed, and that therefore a ruling of the trial judge will be required, before the evidence is properly admissible, a careful regard for orderly procedure demands that the details of the offer should not be stated in the hearing of the jury. This caution in no way impugns the intelligence or the impartiality of the jurors, but only seeks to safeguard the accused against the trial of the charge

upon irrelevant testimony. The jurors, lacking the experience and training necessary to distinguish between the relevant and irrelevant evidence, may take as true and relevant the evidence sought to be offered, even though it should be excluded by the judge. This general rule is often violated, innocently enough perhaps, but with most serious results, where the proposing counsel makes a preliminary statement to the trial judge as to the evidence which he desires to offer, or shows it in the questions put to the witnesses. It has always been the practice, in such exigencies, for the proposing counsel to present the offer in writing, without reading it aloud, to the trial judge and the opposing counsel, and if argument is desired, to afford the court a chance to excuse the jury before making an oral statement and an argument upon the same. The same general rule should govern the putting of questions to witnesses. Commenting on the repeated putting of improper questions to the defendant, the supreme court of Michigan says: 'Had the defendant declined to answer them, an unfavorable influence upon the minds of the jury must inevitably have been produced.' A list of questions which assume the existence of damaging facts may be put in such a manner, and with such persistency and show of proof, as to impress a jury that there must be something wrong, even though the prisoner fully denies it and there is no other evidence."

"These rules should be applied with great strictness when the offer concerns confession evidence. Such evidence is of a class that its very designation indicates its momentous importance, and any wilful disregard of this rule, or any effort to get such evidence before the jury, by innuendo or indirection, and before the trial judge has had opportunity to pass upon its relevancy and admissibility, should be visited with the severest judicial censure."

In People vs. Abell, 71 N. W. 508, the prosecuting attorney stated to the court in the presence of the jury that he offered to prove by the proposed witnesses certain testimony which he thereupon related. This testimony was wholly incompetent and the court so held. But in reply to the objection of defendant's counsel as to the prejudicial remarks of the district attorney, the court stated that counsel had the right to state what he proposed to prove. The appellate court in holding that this was error said:

"While the jury were told that the statement was made for the benefit of the court and that they should disregard it, yet it may well be imagined that such a statement coming from the court would have its effect with them."

To like effect is the case of Leahy vs. State, 48 N. W. 390, wherein the court said it was error to have allowed the prosecuting attorney to make the statement which he did in the presence of the jury. It is the duty of the prosecuting attorney to conduct the trial of a criminal case according to established rules. He acts in a semi-judicial capacity and is supposed to act from principle and without bias or prejudice. The state has guaranteed to everyone a fair trial and such trial cannot be had if the prosecution can resort to tricks to secure a conviction. If such practice was sanctioned it would result in many cases of the conviction of innocent persons.

In the case of Porter vs. Throop, 11 N. W. 174, the Court said:

"That the opening to the jury may be so unfair in the statement of irrelevant facts and so well calculated to prejudice the jury as to justify setting aside the verdict obtained by the party making it."

In the case of Ellis vs. State, 3 Southern 188, the Court said:

"When a confession of the defendant is offered in evidence, the court should ascertain by preliminary examinations conducted out of the presence and hearing of the jury, if requested, whether the proposed confession was made voluntarily and if there is a reasonable doubt against its being free and voluntary it should be excluded from the jury."

In the case of People vs. Wells, 34 Pacific 1078, the district attorney asked witnesses a prejudicial question to which objection was made and sustained. The court reversed the judgment of conviction on this ground. In its opinion the court said:

"There was not the slightest excuse for asking this question. What then was its purpose? Clearly, to take an unfair advantage of the defendant by intimating to the jury something that was either not true or not capable of being proven in the manner attempted and the wrong was not remedied because the court sustained the objection to the question. Counsel undoubtedly knew beforehand that the objection would be sustained. It would be an impeachment of the legal learning of the counsel for the people to intimate that he did not know the question to be improper and therefore wholly un-

justifiable. Its only purpose therefore was to give to the jury a statement under the guise of a question that would prejudice the defendant."

In the case of Kirk vs. Territory, 60 Pacific 797, the Court stated the rule to be as follows:

"We think a correct practice, and one sustained by sound reason and weight of authority is that when testimony is offered to prove a confession and objection is made to the competency of evidence, the court should withdraw the jury. If the court, after hearing the testimony on the competency of the confession decides it was not proper to be shown, then error might be predicated upon the improper evidence before the jury."

It is nothing but plain mockery to claim that the defendant was not prejudiced because the court excluded this testimony. When was this testimony excluded? Was it when first the offer was made? No, it was only after all the testimony had been put before the jury, as the prosecution intended it to be. The poison had already been injected. The bell had already been rung. The damage had already been done, and nothing that the court could have said could in the slightest degree remove the effects of the poison, unring the bell, or undo the damage. As stated by the Court in the case of Harold vs. Okla., 169 Fed. 47:

"Such a practice is nothing but a farcical evasion of the rule of evidence and of the constitutional guaranty which exclude an involuntary confession. A decision that such a confession is incompetent and inadmissible is of little avail to a defendant after officers of the law have

testified to the method of its procurement and to much of its contents, and the only rational way to protect and enforce the rights of the accused is to exclude from the jury all the evidence relative to the competency of the confession, at least until the court has found it competent."

In Zoline's Federal Criminal Law, Section 335, it is stated:

"When confessions are improperly admitted the defendant will be entitled to a new trial."

VIII.

ERROR IN INSTRUCTIONS

(a) Assignment 22 is based upon the refusal of the court to leave to the jury the question of determining whether the confession made by Mr. Rossi before the grand jury was voluntary or not. The defendant requested the court to give the following instructions:

"If you believe that the confession made by Mr. Rossi to Mr. Young, foreman of the grand jury, was traceable to the hope inspired by the assurances made by Mr. Walters and Mr. Glover in the first instance, and that Mr. Rossi at the time was relying upon such assurances when he made the confession to Mr. Young, then such confession is inadmissible and you should disregard it. It is not material whether Mr. Young knew that Mr. Glover had inspired the hope in the mind of Mr. Rossi provided there was a casual connection between the hope aroused and the confession. The fact that the confession was not made to the officer arousing

that hope is immaterial. When an improper influence has been exercised it becomes the duty of the government to show that it has been removed before this subsequent confession can be held admissible." (Trans., p. 242.)

The instruction thus requested was formulated from a like instruction authorized and approved by the decision of Conley vs. State, 7 S. W. 257. Not only did the court refuse to give this instruction, but instructed that as a matter of law that said confession was voluntary and should be considered by them as such. The instruction assigned as error XVII is quoted below:

"I instruct you, however, that the statement made by Rossi in giving evidence (before the grand jury) is not to be so disregarded by you. There is evidence tending to show that Rossi appeared before the grand jury voluntarily and of his own accord, and, although warned that whatever statement he might make would be used in evidence against him, he, notwithstanding, gave such evidence without insisting upon his immunity. The evidence, therefore, of Mr. Young, the foreman of the grand jury, was competent and pertinent to prove the admissions of Rossi with reference to the stamp transactions, and you are to regard these admissions for whatever tendency they may have, if any, to show Rossi's connection with the alleged conspiracy." (Trans., p. 240.)

In the case of State vs. Rein, 49 Fed. 700, the court said that where there is evidence of a confession before a jury, it is for them to determine from all the facts whether the confession was voluntary. Accordingly where it is applicable to the case, it is error for the court

to refuse to instruct the jury in compliance with the written request to do so, that if the accused made a confession under an inducement of hope previously held out by persons other than those to whom it was made, such confession, although not in the presence of those holding out the inducement, should not be considered as evidence.

To like effect is the case of State vs. Ellis, 3 So. 188, wherein the court held it was error to refuse to give this instruction to the jury:

"That if the jury believed from the evidence that the confession of defendant was brought about by fear, they will disregard it."

The trial judge in this case apparently was undecided, as evidenced by his changing opinion upon the question whether or not Rossi's subsequent statement to the grand jury was voluntary or involuntary. It would seem that this case presents a most striking example for the necessity of the giving of the instruction requested. It had resolved itself into a question of fact. The Government had the burden of establishing the fact that the inducing cause that impelled Rossi to make his confession to Glover had been removed when he made his subsequent confession to the grand jury. It was therefore for the jury to say under all the circumstances of the case whether that burden was met.

As stated in Zoline's Federal Law, page 274:

"Where there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant."

As stated in Wharton's Criminal Evidence, page 1422:

"In deference to a line of respectable authorities, it should be here observed that where the confession testimony is conflicting, that is, the testimony adduced as showing the circumstances under which the confession itself was obtained, the question of the character of the confession may be left to the jury."

As stated in the case of Wilson vs. U. S., 162 U. S. 613:

"When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant."

In any event, the defendant especially requested the giving of this instruction. A different situation would be presented if the defendant had not made such a request, but having particularly done so, the authorities seem to indicate that the refusal by the court to give such an instruction is error. As stated in Zoline's Federal Law, page 278:

"If requested by the defendant, the court should specially instruct the jury upon the subject of the necessity that the confession be found to have been voluntarily made before it could be considered by the jury."

(b) Assignment XVIII is predicated upon the following instruction given by the court:

"You will inquire whether the stamps were stolen, and if so, whether by either of the defendants. And in this relation I may say to you that the possession of recently stolen property affords a strong inference that the property was stolen by the person having it in his possession." (Trans., p. 240.)

In this we contend the court erred. The indictment did not charge a conspiracy to buy, receive, steal or give away, possess or deal in stolen property. All that it contemplated was the dealing in altered Government obligations, irrespective of the question whether the Government obligations had been lawfully or unlawfully obtained, which question of itself could have been susceptible of a separate and distinct offense.

The charge as given by the court had the tendency to confuse and mislead the jurors as to the issues they were to determine, and could not help but be prejudicial to the defendant. This is emphasized in the discussion of the assignment next following.

(c) Assignment XX is predicated upon the following instruction given by the court to the jury:

"The next question you ask is this: If defendants thought at the time that they were handling stolen stamps, but did not know they were altered registered stamps, could we find them guilty on this indictment?

"My answer to that is that if the defendants were handling these stamps knowing them to be stolen, and they handled them with intent to defraud the United States, then they would be within the purpose of this indictment." (Trans., p. 241.)

After the jury had been out for a considerable length of time they returned into court with the inquiry mentioned in this charge. Upon the giving of this instruction as hereinabove quoted the jury retired and shortly thereafter returned a verdict of guilty. It will thus be seen that this charge was most persuasive in securing the result desired by the prosecution.

By these instructions (Assignment of Errors XVIII and XX) the jury was led to believe that the theft of the stamps was an essential ingredient of the offense charged. No argument or citation of authority would seem to be necessary to prove that such was not the case. However, the jury could not help but reach the conclusion that if the defendants, or any two of them, conspired to steal these stamps that therefore they must be guilty of the offense charged, irrespective of the question as to whether or not the stamps were altered. The indictment specifically charges a conspiracy to alter Government obligations, and the intent to defraud naturally flows from such a result. The court should,

therefore, not have given the instruction that it did give, without particularly calling to the jury's attention the necessity of finding that the conspiracy contemplated the alteration of stamps, and nothing else, and that the theft of the stamps was a mere incident of the proof, the existence or non-existence of which fact had nothing to do with the crime charged.

Furthermore, there was no evidence of any conspiracy to steal the stamps, and even if there had been any evidence tending to show that one of the defendants stole the stamps (which would fall far short of proving a conspiracy to steal) that could in no wise be charged to the prejudice of the remaining defendants, particularly when the conspiracy charge did not involve the crime of stealing Government obligations. The only evidence that any defendants stole any stamps was that there were found in the possession of defendant Peterson stamps that had previously been stolen from the Scio State Bank. It is not contended that Rossi conspired with Peterson or with any one else to steal these stamps from the Scio State Bank or from any other institution; nor that any two of the defendants indicted conspired to do so. Why then should the defendant Rossi bear the burden as to the instruction given as to the theft of the stamps when he was in no wise involved in the theft and as a co-conspirator he could in no wise be bound by the acts of Peterson, unless done in pursuance to the conspiracy, which conspiracy by the way was not to *steal*

Government stamps but was a conspiracy to *alter* Government stamps—a marked distinction. As stated in 12 C. J. 641:

"Instructions should be so framed that the jury will not be misled thereby."

"Instructions predicated upon facts not in evidence are properly refused."

(d) Assignment XIX is predicated upon the giving by the court of the following instruction:

"Now, gentlemen of the jury, the first question that you propound is the following: Does a stamp simply by being removed from a certificate, said certificate not being registered, become an altered stamp?

"To that I answer: that if the certificate has a stamp attached and the name of the party written upon the certificate, and the stamp thereafter has been removed with intent to defraud, then the defendant would be guilty whether the certificate or stamp was registered or not." (Trans., p. 241.)

The giving of this instruction is in line with instruction assigned as error XV, reading as follows:

"I further instruct you that a removal of the stamps from the certificates, if done with intent to defraud, would be tantamount to an alteration of a government obligation, and would, in effect, render it a falsely made certificate or obligation within the purview of section 148 of the Penal Code and would constitute a violation thereof." (Trans., p. 239.)

This was plainly error, assuming the court should be of the same opinion as District Judge Hough, which is

set out in the appendix, in quashing the indictment based upon the charge of conspiracy to alter government obligations by the removal of a War Savings Stamp from a non-registered certificate. This is more fully elaborated upon under the discussion relative to the sufficiency of the indictment.

(e) Error is likewise assigned to the court's failure to give certain requested instructions which are assigned as errors 23, 24, 25 and 26. These are based upon the presumption that District Judge Hough in his interpretation of the counterfeiting statutes as relating to War Savings Stamps and certificates is correct. If correct, then of course the court's failure to give the requested instructions and the giving of instructions inconsistent with same was error.

IX.

RE NEW TRIAL GRANTED TO PETERSON.

According to the transcript of the record, of all the defendants on trial the only two convicted were Peterson and Rossi. The court has recently ordered that the conviction of Peterson be set aside, thereby leaving the case of Rossi undecided. This being a conspiracy charge, it is elementary that one person cannot be convicted alone, particularly where there is no evidence that any persons other than those named in the indictment had joined in the conspiracy. We, therefore, contend that

the court's decision in setting aside the verdict and granting a new trial to Peterson must necessarily operate likewise in the case of Rossi, the only remaining conspirator found guilty. In Feder vs. U. S., 257 Fed. 694, the court held:

"In a prosecution of two defendants for conspiracy to defraud the United States where on a writ of error there must be a reversal of the conviction of one defendant there must also be a reversal of the conviction of the other."

In Reg vs. Grumpertz, 9 Q. B. 482, Denman, C. J., said:

"We cannot grant a new trial to one conspirator without granting it to all who are convicted; as we cannot separate the defendants there must be a new trial as to all."

CONCLUSION.

The undersigned begs the indulgence of this court for the length of this brief. The importance of the questions involved rendered it absolutely necessary. To have eliminated from the argument the consideration of a single error would have been unfair to the defendant as well as inviting the assertion on the part of the prosecution that such error had been waived. Not only does counsel refuse to relinquish a single point that has been raised, but earnestly insists that they are all meritorious and deserve the careful consideration of this court.

Whatever may be the differences of opinion existing between the trial judge and counsel as to what constitutes a Government obligation, or what constitutes a material alteration thereof, or what should be the scope and limitation of his instructions, there, nevertheless, appears throughout this record, evidence of the venom of newspapers, evidence of the unfair attitude of the prosecution in introducing involuntary confessions before the jury, and evidence of a most flagrant breach of trust, all of which evidence, while contributing to the conviction of the defendant must remain a blot and disgrace upon that spirit of fair play and justice which should characterize the conduct of Government officials as well as of Government prosecutions.

Plainly and frankly stated, the indictment of Rossi was simply a means of "showing up" W. A. Glover, a secret service agent, who had for twenty years served his Government and its chief executives so as to merit his appointment as head of the Portland office. For some reason he had incurred the ill will of W. R. Bryon, the agent in charge of the Bureau of Investigation of the Department of Justice. Glover had seen fit to promise immunity to Rossi for his aid and information. Glover was an officer in authority and in charge of the particular investigation wherein he sought Rossi's help. Whether wise or unwise, that promise had been made. Whether justified by the circumstances or not the word of the secret service had passed. Up until now that

word had been religiously kept. It had never before been broken. There was no reason for Rossi to question or doubt the efficacy of this promise. He kept faith with the Government. He had a right to believe that the Government would likewise keep faith. Subsequently Glover was replaced by Bryon and Rossi was made the unfortunate victim of the ill-will existing between those Government officials. Glover had to be shown that his word meant nothing. Glover was so shown, but only at the sacrifice of the Government's honor, for the faith replaced in it was violated. Bryon had Rossi to appear before him. The defendant felt safe and secure in the promise of the Government. About the same time he was brought before the grand jury. There still was no cause for alarm. He had repeated his testimony to Glover and Bryon. He had promised Glover information that would lead to the indictment of the parties involved in the transaction. He naturally expected that his appearance before the grand jury was in line with his promise. Not only was his faith trampled upon and the promise of immunity from prosecution violated by his indictment at the hands of the grand jury, but when brought into court as a defendant, an attempt was even made, and it was successful, to bring about his conviction by his own utterances made under the holy promise of immunity. The Government has no reason to be proud of a conviction obtained by such measures.

It would be idle to speculate upon the chances of the Government to convict Rossi without the aid of his own incriminating testimony. Suffice to say, it placed a weapon in the hands of the prosecution that it would never have received except for the promise it so solemnly gave, and which it so ruthlessly broke. Whatever might be the opinion of a fair-minded person of one who after promising immunity from prosecution deliberately sets about to indict and prosecute him, at least the defendant had the right to expect that when the Government presented its evidence it would not avail itself of his own admissions given under such promise. That the defendant was grossly deceived goes without question; that he was prejudiced by the introduction of this testimony is plain. In all fairness and justice he is entitled to a new trial, limited in scope to the rigid rules of evidence that forbids the use of admissions obtained under the promise of immunity.

For the various reasons hereinbefore stated and discussed, the judgment should be reversed.

Respectfully submitted,

BARNETT H. GOLDSTEIN,
Attorney for Plaintiff in Error.

APPENDIX

District Court of the United States—Southern District of New York.

UNITED STATES OF AMERICA

Indictment 7828—Docket C. 20-251.

vs.

PAUL SACKS.

UNITED STATES

Indictment 8269—Docket C. 21-170.

vs.

HERMAN JANOWITZ, HERMAN OESTREICHER, HENRY GOLDSTEIN, ETTA LEVINE, JULIUS ROTH and JOHN C. DALTON.

The case of Sacks having been called, for trial, defendant moved in open court to quash the indictment on the ground that upon the true construction of the statutes suggested as authorizing the prosecution,—Sacks could not be guilty.

The case of Janowitz *et al* being likewise called on the day being set for trial, defendants with the consent of the prosecutor moved to withdraw their pleas of not guilty and offer a demurrer to the indictment.

The motion was granted, and on a day subsequent both the motion to quash and the demurrer were argued at length.

The cases are thought to be typical of a number of prosecutions now pending in this district, and considering the nature of the criminality alleged and the diversity of opinion that has arisen thereupon, it has seemed best to permit, and indeed facilitate, the prosecution of the legal questions in such shape that if decided adversely to the prosecution, authoritative review will not be only possible but expeditious.

The several counts of these indictments rest not only upon the sections of the Criminal Code hereinafter pointed out, but on the 6th section of the Act of September 24, 1917, (which authorized "War Saving Certificates") and the 2nd section of the Act of September 24, 1918, but upon a series of "Department Circulars" issued from the office of the Secretary of the Treasury and of which this court has taken judicial notice.

These circulars are No. 94, or War Saving Circular No. 1, dated November 15, 1917; No. 108, or War Saving Circular No. 8, dated January 21, 1918; No. 101, War Saving Circular No. 5, dated February 19, 1918, and No. 123, dated December 18, 1918.

The first and second counts of the Sacks indictment allege a violation of Section 148 of the Criminal Code in that Sacks with intent to defraud *altered* an obliga-

tion of the United States, to-wit: a War Saving Certificate, by tearing a war saving stamp of 1918 therefrom.

The second count of the Janowitz indictment alleges that the defendants conspired to violate Section 148 in that they purchased certificates of the series both of 1918 and 1919 from persons not authorized to sell same by the Secretary of Treasury; that they also obtained war saving certificates to which stamps had never been affixed and on which no owner's name had ever been written, and that they intended and agreed to detach the stamps from the purchased certificates, to the end that in the name of some other person other than the defendants the certificates might be presented for redemption at a Post Office and at a date prior to maturity.

Thus Sacks is accused under what is usually called the counterfeiting statute, and Janowitz *et al* are accused of conspiring to commit the same offense.

The third count of the Sacks indictment rests on Section 151 of the Criminal Code, and charges the defendant with keeping in possession with intent to defraud an altered obligation of the United States, that is to say a piece of pasteboard obviously torn from a certificate of the series of 1918 and having three stamps affixed. The original documents said to have been forged or altered by Sacks are annexed to and made a part of the indictment against him.

The first count of the Janowitz indictment charges under Section 37 of the Criminal Code a conspiracy to defraud the United States by doing exactly the same things as are specified in the second count to constitute a conspiracy to commit an offense under Section 148.

The scienter as to fraud is thus set forth:

"And the defendants would and did then and there well know that the United States was not obligated to pay them money for the said purchased certificates for the said purchased stamps or the said blank certificates, and that the said purchased certificates, the said purchased stamps and the said blank certificates were worthless in their hands, and that they were not, that not one of them was entitled to receive payment therefor from the United States at or before maturity thereof, and that the United States was not obligated to pay them or any one of them therefor at or prior to maturity thereof."

Joseph A. Seidman for Sacks;

David Goldstein and Aiken A. Pope for Janowitz, Oestreicher and Goldstein;

John McKim Minton, Jr., and Joseph F. Curren for Levins;

Francis G. Caffey, U. S. Attorney, and James W. Osborne, Special Assistant to the Attorney General, for the United States.

MEMORANDUM DECISION

The words of the Act of Congress especially invoked in this matter are that "It shall not be lawful for any one person at any one time to hold War Saving certificates to an aggregate amount exceeding $1,000", and the further provision: "The Secretary of the Treasury may under such regulations and upon such terms and conditions as he may prescribe, issue * * * stamps to evidence payment for or on account of such certificates." It was under this statute that the issue of 1918 was put forth; the only material difference as to the issue of 1919 was an amendment of the act declaring that "It shall not be lawful for any one person at any one time to hold War Saving certificates *of any one series* to an aggregate amount exceeding $1,000."

Department circulars Nos. 94, 101 and 108 may reasonably be taken from their date to apply to the issue of 1918. Circular No. 128 is the announcement of the certificate series of 1919, but I do not think that circular changed the material regulations previously issued and affecting all War Saving certificates.

I have assumed that all these circulars are to be treated as Treasury regulations, although only one of them (No. 108) is called by that name.

Circular 94 declares that a War Saving certificate of the series of 1918 will be an obligation of the United

States when and only when "at least one stamp is affixed thereto; but the Secretary "offers for sale" War Saving certificates payments for or on account of which "must be evidenced by" stamps which "are to be affixed thereto."

It is declared that no certificate will be issued unless at least one stamp shall at the time be purchased and affixed thereto, but "no additional charge" will be made for the certificate itself. It is required that the name of the owner of each certificate must be written thereupon "at the time of the issue thereof".

It is then declared by No. 94 that "War Saving certificates are not transferable and will be payable only to the respective owners named thereon" except in events not now material. I think these were all of the instructions, regulations or rules in existence at the time stamps were first put on sale.

No. 108, which is formally entitled as a "Treasury regulation," contains in the 14th paragraph the language thought to be most important in this litigation.

It is by that rule provided that if any person receives certificates in excess of an aggregate of one thousand dollars maturity value *in any lawful manner*,—the excess amount shall be immediately surrendered at a Money Order Post Office and be paid for at their then value; but

"In any other case if it shall appear at the time certificate is presented for payment that the person presenting the same holds certificates to an aggregate amount exceeding a thousand dollars maturity value, the Postmaster shall refuse payment of all certificates in excess of such amount and shall demand surrender of certificates held by such owner until the holdings of such owner are reduced to a thousand dollars maturity value. The Postmaster shall make appropriate notation on certificates so surrendered and shall forward such certificates to the Third Assistant Postmaster General for transmission to the Secretary of the Treasury. *Such certificates shall have no validity for any purpose.*"

Under these rules or regulations and the statute it has been admitted on this argument that a War Saving stamp is property in the ordinary sense of the word; that it may pass from hand to hand like any other similar piece of property.

Yet it is said that this property has no value in and of itself; it is but a receipt for a certain amount of money; but when it is affixed, not to *any* certificate of the corresponding series, but to a certificate bearing the name of the person who obtained it from an agent of the Treasury and still owned by that person, it becomes an integral, irremovable portion of an indissoluble obligation of the United States.

The remainder of the Treasury or prosecutor's position is that if by purchase one accumulates certificates bearing stamps in excess of a thousand dollars maturity value, such excess is subject to a confiscation if the Post-

master can get hold of it; but in any event the excess certificates "shall have no validity for any purpose."

Applying these regulations to these indictments it is observable that in the Sacks indictment there is no effort to apply, and that instrument bears no relation to, regulation No. 14. It is not alleged that Sacks had or tried to get more than a thousand dollars worth of certificates of the series of 1918 (maturity value). The proposition is baldly that when Sacks removed a stamp from a certificate bearing a name not his own, and did it "with intent to defraud," he became what is commonly called a counterfeiter under Section 148. And in the third count it is alleged in substance that when Sacks had in possession "with intent to defraud the United States and with intent to pass and sell the same" a piece of pasteboard having certain stamps upon it, he was criminally possessed of a counterfeited obligation of the United States under Section 151.

In other words the excess proviso of the Treasury regulation has no application to the Sacks indictment.

The Janowitz indictment is more subtle, for both counts allege in substance a business scheme, viz: the purchase of war saving certificates with intent to detach stamps therefrom and use them upon other certificates bearing other names.

But nowhere is it alleged as a part of the conspiracy that any member of the Postal force was to be corrupted

in order that the defendants might procure money for any certificates either before or at maturity. The proposition baldly is that purchased certificates and the stamps affixed thereto were worthless for any purpose in the hands of the purchaser, no matter whether the amount of such purchased certificates was small or great; the proposition is that, once affixed to a certificate, the united stamp and pasteboard became sacrosanct and cannot be disunited; and the moment such legal entity passes from the hands of the original holder (by purchase at all events) to the hand of another it crumbles into legal dust and becomes, in the language of the Janowitz indictment, "worthless in their hands" (i. e. purchaser's hands), and so worthless that payment could never become due whether "at or before maturity."

It may here be noted that the language of the stamp of the series of 1918 is this: "United States War Savings Certificate Stamp. When affixed to a certificate, Five Dollars will be payable January 1, 1923."

One other argument has in argument at this bar been admitted all round, viz: That when Congress said that it should "Not be lawful" for any one person at any one time to hold more than a thousand dollars worth of War Saving certificates, Congress did not make such holding a crime.

To me it appears very plain that the foregoing elements of discussion produce the following problems:

(1) Do the rules of the Treasury prohibit so as to render valueless in the hands of the transferree, War Saving Stamps—as distinct from the certificates or pasteboards to which they are attached?

(2) If the Treasury Rules are to be interpreted as going this far, is their violation criminal?

(3) If the rules do go as far as above indicated and the intent thereof was to make their violation criminal, are such rules so interpreted with the statutory power of the Secretary of the Treasury?

(First) It appears to be plain that neither of the counts in the Sacks indictment, nor the second count in the Janowitz indictment requires the Treasury regulations to be interpreted as taking all value out of the transferred stamps.

Indeed, the very allegations that the removal of a stamp constitutes alteration within the counterfeiting act seems necessarily to imply a value in the thing removed.

But the first count of the Janowitz indictment plainly invokes that very wide definition of the phrase "defraud the United States" which received authoritative statement in Hass vs. Henkel, 216 U. S. 462, and it is said (in substance) that it is a lawful function of the Treasury department to prevent the United States being compelled, or even requested, to redeem a War

Saving stamp in other manner than for the person and in the manner preferred by the Treasury. Wherefore, it was a lawful exercise of the regulatory power conferred by the statute to destroy and destroy utterly all property value in a transferred certificate, and therefore in a transferred stamp attached thereto.

It cannot be denied that such destruction of property rights is a possible exercise of congressional power; Section 3477 Revised Statutes as interpreted in Re Hudford Co., 257 F. R., 722 and cases cited, proves this.

In my opinion, therefore, the regulation prohibiting transfer, taken in conjunction with the 14th section of Circular 108, is an effort by the Secretary through departmental regulations to produce exactly the conditions wrought by Congress under the section of the Revised Statutes last above referred to.

Second, if the Treasury regulations thus interpreted are reasonable, appropriate and consistent with the Act of Congress their violation is as much a transgression of the statute as if the regulatory provision had been written in the act. This seems to me the result of United States vs. Morehead, 243 U. S. 607, and United States vs. Smull, 236 U. S. 405.

Applying the extreme interpretation which seems necessary to sustain the first Janowitz count to the crimes averred under Criminal Code Sections 146 and 151, it must follow that it is as much counterfeiting or

forging to put a transferred stamp on a certificate as it is to detach a stamp from a certificate and thereby alter the same.

This extreme interpretation must I think be adopted throughout, because the regulations cannot be so interpeted in one breath as to sustain a count that rests only on Section 37, and then softened when the extreme holding is not necessary to sustain other counts.

Third, the preferred statement of the prosecutor in support of especially Section 14 of Circular 108 is that a stamp in and of itself is nothing; it has no value except as a receipt.

From this flows the assertion that when that receipt is affixed to a pasteboard which by itself has no value whatever, the two things put together become an obligation of the United States not dissimilar from a bond or a Treasury note, except that the quality or assignability or transferability is denied to it.

It is said that even if the stamp, *per se* worthless, may pass from hand to hand, it becomes when affixed to the certificate like the ink upon a note and its removal is as much an alteration as would be the erasure of that ink.

To me this is an ingenious but fallacious arrangement of words. To deny value to the War Saving stamp is against common sense and contradictory to a

course of business vigorously pursued for the last few years, which has succeeded in forcing these stamps into the possession of people whom it is sarcasm to call "investors," and who would be surprised beyond measure to be told that their stamps had no "value."

When Congress authorized the issuance of "stamps to evidence payments for or on account of such certificates" and did not deny to the stamp holders the right to transfer such right existed. The Treasury has sought to take it away by making the certificates non-transferable. Assuming that power exists to prohibit transfer of the certificates, I am wholly unable to perceive that there is any congressional authority for the Secretary's prohibiting the transferability of the stamps affixed to the certificates.

Nowhere is it said that any particular stamp shall evidence a payment on any particular certificate.

This I think is the gist of the matter: Is a regulation which as interpreted, in terms takes away a property right in a manner not specifically authorized by statute, a valid rule? I cannot persuade myself that such is the case.

Congress has certainly not done that which was held sufficient to make a crime of rule violation in United States vs. Grimaud, 220 U. S. 506. The Smull and Morehead cases, *supra,* do, I think, hold that where the

manner of obtaining a grant is committed to a department, that department may regulate the procedure to obtain the same, and if a violation of that procedure runs counter to any criminal statute of congress, then violation of the regulation is punished by the statute, and so within the Grimaud case, *supra.*

But the prohibition against transfer of stamps affixed or unaffixed is far more than a procedural regulation. A stamp is a thing of value, bought and paid for, and to deprive it of the quality of assignability is a diminution of lawfully existing property rights for which in my judgment congressional action alone will suffice.

One further consideration is peculiar to the third count of the Sacks indictment.

It is not alleged that Sacks tore up or tore off a piece of pasteboard bearing stamps from a War Saving Certificate. It must be assumed that he did not do it, and I think it must even be assumed (in favor of innocence) that the holder and owner pursuant to Treasury regulations of the certificate from which the place was torn, did the deed himself. The necessary implication of this third count is that such an act by the owner of the obligation constituted a violation of Section 148, for only by that holding could Sack's possession be a violation of Section 151—in manner and form as alleged.

It follows, therefore, that by Treasury regulations alone an owner who destroys an obligation (for this certificate was certainly destroyed as such) violates Section 148, unless he also destroys the stamps which are just as much his after destruction of the pasteboard as they were before—unless, of course, the Treasury Department can diminish his property right.

That Department has endeavored to diminish such property right, and indeed to destroy it utterly unless the right is exercised as per regulation. It does not seem to me that this is a method of carrying out the statue as written. It is additional and very drastic attempted legislation.

For these reasons the motion to quash is granted and the demurrer sustained.
Feb. 27, 1920.